86-748

Supreme Court, U.S.
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No. .....

In The

Supreme Court of the United States

October Term, 1986

UNITED STATES OF AMERICA ex rel. CHUNIE (FRANCES S. HERRERA); THE BROTHERHOOD OF THE TOMOL, INC., a California non-profit corporation, and all Chumash descendants similarly situated,

Petitioner,

vs.

MARIE RINGROSE, ILDA McGUINNESS, PIER GHERINI, FRANCES GHERINI, THE NATURE CONSERVANCY, a District of Columbia non-profit corporation, SANTA CRUZ ISLAND COMPANY, a California corporation, ALEXANDER LENNOX VAIL, JAMES VAIL WILKINSON, NATHAN RUSSEL VAIL, MARGARET VAIL WOOLEY, and THE VICKERS COMPANY, LTD., a California corporation; and THE STATE OF CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Act of March 3, 1851—which required any person claiming lands in California by virtue of right or title derived from the Spanish or Mexican governments to present their claims to a board of land commissioners within two years—is applicable to Chumash Indians claiming lands under aboriginal Indian title.

LIST OF PARTIES

Pursuant to Rule 21.1 of the Rules of the United States Supreme Court, the following is a list of all parties to the proceedings before the Ninth Circuit Court of Appeals, to-wit:

APPELLANTS: United States of America Ex Rel. Chunie (Frances S. Herrera) and the Brotherhood of the Tomol, Inc. Although the case was filed as a class action on behalf of all Chumash descendants similiarly situated, the class was never certified by the District Court.

RESPONDENTS: Marie Ringrose; Ilda McGuiness; Pier Gherini; Frances Gherini; The Nature Conservancy, a District of Columbia Corporation; The Santa Cruz Island Company, a California corporation; Alexander Lennox Vail; James Vail Wilkinson; Nathan Russel Vail; Margaret Vail Wooley; The Vickers Company, a California Corporation; and The State of California.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner United States of America ex rel. Chunie (Frances S. Herrera) and the Brotherhood of the Tomol, Inc. respectively pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on April 29, 1986.

OPINION BELOW

The Opinion of the Ninth Circuit Court of Appeals as amended, is reported at 788 F.2d 638. The original opinion and judgment of the Court of Appeals appear in Appendices B and C, and the amendment to the opinion appears in Appendix D. The unreported Order of the District Court granting Defendants' motion to dismiss appears in Appendix A.

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JURISDICTION OF THE COURT

The Final Judgment and Opinion of the Court of Appeals were filed and entered on April 29, 1986. The Order Amending Opinion was filed on May 5, 1986. A timely Petition for Rehearing was served on May 19, 1986 (Appendix E) and an order denying the petition was filed on August 6, 1986 (Appendix F). This Petition for a Writ of Certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

———o———

TREATIES AND STATUTES INVOLVED

The treaties and statutes involved are:

(1). The 1848 Treaty of Guadalupe Hidalgo, 9 Stat. 922 (Appendix G), which ceded all of the State of California from Mexico to the United States, and required the United States to protect the property of Mexican citizens,

and the property of former Mexican citizens who elect to become United States citizens, and

(2). The Act of March 3, 1851, ch. 41, 9 Stat. 631 (Appendix H), which was enacted for the purpose of ascertaining and settling private land claims in the State of California. The Act created a board of three commissioners to determine the validity of land claims in California and required every person claiming by virtue of any right or title derived from the Spanish or Mexican Governments to present their claims within two years. Any land not claimed within two years, and any land for which a claim was rejected, was deemed part of the public domain of the United States.

STATEMENT OF THE CASE

From time immemorial, the Chumash Indians have occupied the Santa Barbara Islands and surrounding channel beds[1] and mainland. Two of the islands, Santa Cruz and Santa Rosa, lie off the Santa Barbara coast and each cover approximately 50,000 acres. *United States ex rel. Chunie v. Ringrose,* 788 F.2d 638, 641 (9th Cir. 1986), Appendix at B-2.

Spain initially claimed all of California, including Chumash territory, under the doctrine of discovery. Span-

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[1] "Channel beds," as used in the Chumash's complaint, refers to both tide and submerged lands underlying the Pacific Ocean within three geographical miles seaward from the coastline of Santa Cruz and Santa Rosa Islands. See *United States Ex Rel. Chunie v. Ringrose,* 788 F.2d 638, 646 n. 3 (9th Cir. 1986), Appendix at B-16.

ish and Mexican law regarding aboriginal title does not differ from United States law. Spain's discovery of California "conferred upon Spain the right as sovereign to extinguish the Indians' aboriginal title" and Mexico, upon its independence from Spain, "acquired this right . . ." *Id.* at 642, Appendix at B-5.

In the 1830's and 1840's, the Mexican government granted Santa Rosa Island to Antonio and Carlos Carrillo and Santa Cruz Island to Andres Castillero. *Id.* at 641, Appendix at B-3. "[T]he Mexican land grants to Castillero and the Carrillos did not effect an extinguishment of the Chumash's aboriginal title." *Id.* at 642-643, Appendix at B-7.

Under the 1848 Treaty of Guadalupe Hidalgo (9 Stat. 922), Mexico ceded all of California to the United States. To settle land claims in California, Congress passed the Act of March 3, 1851 (9 Stat. 631). This Act created a board of commissioners to determine the validity of claims, and required every person "claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" to present the claim within two years. *Id.* at 641, Appendix at B-3.

Andres Castillo, and the successor-in-interest to the Carrillos, presented claims to the 1851 board of commissioners, which were upheld by the federal courts. *Id.* at 641, 645, Appendix at B-3, B-12. "The Chumash did not file any claims under the [1851] Act," since "aboriginal title is not derived from the Spanish and Mexican government." *Id.* at 645, Appendix at B-12.

The Chumash claim unextinguished aboriginal Indian title to the islands and surrounding channel lands.[2] They instituted this suit in District Court seeking declaratory relief, damages for trespass and conversion, injunctive relief, and attorneys fees. Eight individuals and three corporations who claim interests in either Santa Cruz or Santa Rosa Islands, and the State of California which claims ownership to the surrounding tide and submerged lands were named as defendants. *Id.* at 641, Appendix at B-4.

On motions filed by defendants, the District Court held that plaintiffs failed to state a claim for which relief can be granted and dismissed the case. A timely appeal was filed by the Chumash. *Id.* at 641, Appendix at B-4.

On appeal, the Ninth Circuit Court of Appeals:

1. Held that the District Court erred in holding that the Mexican Government's grant of Santa Cruz and Santa Rosa Islands to private individuals extinguished the Chumash Indian's aboriginal title and that "Castillero and

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[2]It is undisputed that the Chumash are "claiming a right of occupancy based on aboriginal title" in this case. *United States Ex Rel. Chunie,* 788 F.2d 638, 646 (9th Cir. 1986), Appendix at B-15. In Paragraph 4 of their amended complaint, the Chumash allege that "[f]rom time immemorial, the Chumash people have occupied the islands and surrounding channel beds. Each and every part of this territory was used for and was essential to the subsistence and religious observances of the Chumash people." See *First Amended Complaint,* Docket Entry No. 9, para. 4. These factual allegations were accepted as true by the Appeal Panel for the purposes of appeal. See *Chunie, supra,* 788 F.2d at 641. Accord, *United States v. Mississippi,* 380 U.S. 128, 143 (1965) (In considering the correctness of a dismissal for failure to state a claim upon which relief can be granted, "the allegations of the complaint are to be taken as true").

the Carrillos, and their successors in interest, took the islands subject to Chumash's right of occupany. *Id.* at 641-643, Appendix at B-7.[3]

2. Held that the Chumash lost all rights to the islands and surrounding channel beds when they failed to present claims in the land confirmation proceedings undertaken pursuant to the Treaty of Guadalupe Hidalgo and the 1851 Act and affirmed the District Court on this basis. *Id.* at 644-647, Appendix at B-11 to B-16.

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[3]In reversing the District Court, the Appeal Panel ruled that the "land grants to Castillero and the Carrillos did not effect an extinguishment of Chumash's aboriginal title" and therefore "Castillero and the Carrillos, and their successors-in-interest, took the islands subject to the Chumash's right of occupancy." *United States Ex Rel. Chunie v. Ringrose,* 788 F.2d 638, 642-643 (9th Cir. 1986). This ruling correctly upholds the principle in *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543, 574 (1823), that European discovers inherited the power to grant lands occupied by Indians, but "[t]hese grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy." [Emphasis Supplied]. Also see *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); *Beecher v. Wetherby,* 95 U.S. (5 Otto) 517, 525 (1877) (The grantee . . . would take only the naked fee, and could not disturb the occupancy of the Indians . . ."); *Chouteau v. Molony,* 57 U.S. (16 How.) 203, 239 (1853) (land grants by the Spanish governors were made subject to the rights of Indian occupancy).

REASONS FOR GRANTING THE WRIT

I. CHUMASH ABORIGINAL TITLE IS NOT DERIVED FROM EITHER SPAIN OR MEXICO AND THEREFORE DID NOT HAVE TO BE PERFECTED UNDER THE 1851 ACT.

A. Nature of Aboriginal Indian title.

In the first case it considered involving aboriginal Indian title, the Supreme Court stated:

> What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. Its overrun by them, rather than inhabited. It is not a true and legal possession. * * * * * * * It is a right not to be transferred but extinguished. It is a right regulated by treaties, not by deed of conveyance. It depends upon the law of nations, not upon municipal right. [Cites Omitted].

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 121 (1810).

The power of European governments, and successors in interest such as the United States, to acquire Indian title under international law was later discussed in *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823):

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim in ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited in-

dependence. But, as they were all in pursuant of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

* * * * *

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by

> all, to convey a title to the grantees, subject only to the Indian right of occupancy.
>
> The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.
>
> * * * * *
>
> The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.[4]

Id. at 572-574, 587.

Aboriginal Indian title is "considered as sacred as the fee simple of the whites," *Mitchel v. United States,* 34 U.S. (Pet.) 711, 745-746 (1835), and recognizes the Indians as "the rightful occupants of the soil, with a legal as well as just claim to retain possession." *Johnson v. M'Intosh, supra,* 21 U.S. (8 Wheat.) at 574. It entitles the tribes to full use and enjoyment of the surface and mineral estate, and to resources, such as timber, on the land." *Ringrose, supra,* 788 F.2d at 642, Appendix at B-5. The right of possession "is good against all but the sovereign" and can "be terminated only by sovereign act." *Oneida Indian*

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[4]Also see *Holden v. Joy,* 84 U.S. 211, 244 (1872), where the Court held that the Cherokee Indians' aboriginal title was absolute subject only to the pre-emption right of purchase acquired by the United States as the "successor" to Great Britain.

Nation v. County of Oneida, 414 U.S. 661, 667 (1974).[5] Also see *Cramer v. United States*, 261 U.S. 219, 227 (1922) ("[I]t has been the policy of the Federal Government from the beginning to respect [Indian Title], which could be interfered with or determined by the United States); *United States v. Dann*, 706 F.2d 919, 922 (9th Cir. 1983) ("[I]t is valid against all parties until it is 'extinguished' by the United States"), rev'd. on other grounds 105 S.Ct. 1058 (1985).[6]

B. Applicability of the doctrine of discovery to the Mexican cession area.

Spanish recognition of the doctrine of discovery is evident in *Chouteau v. Molony*, 57 U.S. (16 How.) 203, 239

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[5]An extinguishment of aboriginal title by the United States does not give rise to a right of compensation under the Fifth Amendment. *United States v. Dann, supra*, 706 F.2d at 922 n. 1 (Citing *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955)). The Chumash presented an ancillary recognized title claim below, *United States Ex Rel. Chunie v. Ringrose*, 788 U.S. 638, 644 (9th Cir. 1986), but do not challenge the findings of the Appeal Panel regarding recognized title in this Petition.

[6]It would also be valid against a party such as the State of California.

In this case the United States acceded to the rights possessed by the Mexican Government in California prior to 1848 under the doctrine of discovery. This includes fee title, which was passed to the United States subject to the Indian right of occupancy. Upon statehood, the State of California acquired whatever rights the United States passed to them under the Equal footing doctrine, i.e., fee title to tide and submerged lands. This explains why the State had to perfect its fee interests—which were derived from the Mexican Government as the successor-in-interest to Spain—in *Summa Corporation v. California ex rel. State Lands Commission*, 466 U.S. 198 (1984). It also explains why the Indians claiming aboriginal Indian title in *Cramer v. United States*, 261 U.S. 219 (1923), were not subject to the 1851 Act.

(1853), where the Supreme Court held that a Spanish land grant was "made subject to the Indian right of occupancy." The Mexican Government acceded to the doctrine of discovery when it gained its independence from Spain in 1821. *Chunie, supra,* 788 F.2d at 642, Appendix at B-5.

The Court, moreover, has made it clear that "lands within the Mexican Cession were not excepted from the policy to respect Indian rights or occupancy," and it would "take plain and unambiguous action to deprive [Indians] of the benefits of that policy." *United States ex rel. Haulpai Indians v. Santa Fe Pacific Railroad Co.,* 314 U.S. 339, 345-46 (1941). The Court expressly found that:

> [T]he Cramer case assumed that lands within the Mexican cession were not excepted from the policy to respect Indian right or occupancy. Though the Cramer case involved the problem of individual Indian occupancy, this Court stated that such occupancy was not to be treated differently from 'the original nomadic tribal occupancy.' * * * Perhaps the assumption that aboriginal possession would be respected in the Mexican Cession was, like the generalizations in the *Johnson v. M'Intosh,* . . . not necessary for the narrow holding of the case. But generalizations have been so often and so long repeated as respects land under the prior sovereignty of the various European nations including Spain, that like other rules governing title to property . . . *they should now be considered no longer open.*" [Emphasis Supplied].

Id. at 346.

Thus, it is "no longer open" to question that the doctrine of discovery is applicable to Chumash territory in the State of California and Chumash aboriginal title lands must be respected until title is expressly extinguished by Congress.

C. Establishment of aboriginal Indian title.

"The existence of aboriginal title is in every case a question of fact." *United States v. Dann,* 706 F.2d 919, 933 n. 10 (9th Cir. 1983) (*Citing United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad Co.,* 314 U.S. 339, 345 (1942)), rev'd. on other grounds at 105 S.Ct. 1058 (1985). Exclusive use and occupation "for a long time" prior to the loss of the property by a tribe is sufficient to give aboriginal title. *Sac and Fox Tribe v. United States,* 383 F.2d 991, 998 (Ct.Cl. 1967) (*Citing Sac and Fox Tribe v. United States,* 315 F.2d 896, 903 (Ct.Cl. 1963), *cert denied* 375 U.S. 921 (1963)); *Turtle Mountain Band v. United States,* 23 Ind. Cl. Comm. 315, 323-324 (1970). "That a 'long time' ran during the period of United States sovereignty over [an] area involved rather than during the period of . . . Spanish [and Mexican] sovereignty is irrelevant insofar as the perfecting of Indian title is concerned." *Sioux Nation v. United States,* 23 Ind. Cl. Comm. 419 423 (1970).

D. Extinguishment of aboriginal Indian title.

The Supreme Court in *Johnson v. M'Intosh, supra,* 21 U.S. (8 Wheat.) at 587, provided that extinguishment of aboriginal title could occur "either by purchase or by conquest." The Court later clarified the manner in which Indian title could be extinguished by holding extinguishment can occur, "whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." "The intent must be clear, however, 'an extinguishment cannot be lightly implied.'" *United States v. Dann, supra,* 706

F.2d at 928 (Citing *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad Co.*, 314 U.S. at 347 (1942)).

In *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976), the Ninth Circuit Court of Appeals stated that:

> [D]espite 'the policy of the Congress, continued throughout our history, to extinguish Indian title through negotiation rather than by force' . . . , extinguishment need not be accomplished by treaty or voluntary cession. *The relevant question is whether the governmental action was intended to be a revocation of Indian occupancy rights,* not whether the revocation was effected by permissible means. [Emphasis Supplied].

Id. at 1148.

The Ninth Circuit—without deciding whether Congress intended in the "ambiguous Act of 1851" to extinguish aboriginal Indian title of the Pitt River Indians of California[7]—further noted that the exact date of extinguishment "is often difficult to determine." *Gemmill, supra,* 535 F.2d at 1149. The court, after examining various governmental actions regarding Pitt River lands, found that:

> Any one of these actions, examined in isolation, may not provide an unequivocal answer to the question of

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[7]Ambiguous acts regarding Indians are to be liberally construed and interpreted in their favor: "[D]oubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354 (1941) (quoting *Choate v. Trapp*, 224 U.S. 665, 675 (1912). The Appeal Panel should have therefore resolved the applicability of the 1851 Act to Chumash aboriginal title in favor of the Chumash instead of against them.

> extinguishment. However, the activity of the federal government, beginning with the ambiguous Act of 1851 and culminating in the payment of the compromise settlement, has included expulsion by force, inconsistent use, and voluntary payment of compensation agreement. * * * This century-long course of conduct amply demonstrates that the Pitt River Indian title has been extinguished.

Gemmill, supra, 535 F.2d at 1149.

II. THE SCOPE AND MEANING OF THE APPEAL PANEL'S DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND THE COURT OF CLAIMS HOLDING THAT ABORIGINAL TITLE SURVIVES STATE SUCCESSION AND MUST BE RESPECTED UNTIL IT IS EXPRESSLY EXTINGUISHED BY CONGRESS.

The Appeal Panel held that the Chumash lost all rights to Santa Cruz and Santa Rosa Islands and surrounding channel beds when they failed to present their claims in the land confirmation proceedings undertaken pursuant to the 1848 Treaty of Guadalupe Hidalgo and 1851 Act. *Ringrose, supra,* 788 F.2d at 644-647. The [*ratio decidendi*] for this holding can be broken down as follows:

> (1). Aboriginal Indian title "is not an ownership right, but is rather a right of occupancy granted by the conquering sovereign" and is therefore "a creature of the conquering sovereign's law." *Ringrose, supra,* 788 F.2d at 642, Appendix at B-5. "Spain's discovery and conquest[8] of the California's

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[8]The Appeal Panel apparently equates discovery with conquest in this regard. This is, of course, inconsistent with the language in *Johnson v. M'Intosh,* that, after discovery, extinguishment could be "either by purchase or conquest," 21 U.S. (8 Wheat.) at 587, which the Appeal Panel accepted as applicable to this case. *United States ex rel. Chunie v. Ringrose,* 788 F.2d at 642, Appendix at B-6.

Conferred upon Spain the right as sovereign to extinguish the Indians' aboriginal title. When Mexico obtained its independence from Spain, Mexico acquired this right to extinguish aboriginal title." *Ringrose, supra,* 788 F.2d at 642, Appendix at B-5.

(2). Upon transfer of sovereignty over Chumash territory from Mexico to the United States under the 1848 Treaty of Guadalupe Hidalgo, Chumash title become frozen under Mexican law. The aboriginal title asserted by the Chumash is therefore frozen under Mexican law as of 1848 and hence "derived from" Mexican law. *Ringrose, supra,* 788 F.2d at 646, Appendix at D-2 ("The Chumash . . . do derive their claim from a right of occupancy existing under Spanish or Mexican law, and their right existed well before 1848).

(3). Subsequent to 1848, individual Indians in the Mexican Cession area could still move upon a tract of their aboriginal tribal territory, fence it off, cultivate it, and re-establish individual aboriginal title under United States law such as the California Indians in *Cramer v. United States, supra. Ringrose, supra,* 788 F.2d at 646, Appendix at D-2 ("These facts explain the court's remark that the *Cramer* Indians 'are not shown to be within the terms of the Act of 1851 in any respect.' ").

(4). The Chumash claims in this case are based on *tribal* aboriginal title established under Mexican law prior to 1848 and not *individual* aboriginal title established under United States law subsequent to 1848. Chumash claims to tribal aboriginal title are therefore subject to the land confirmation proceed-

ings undertaken pursuant to the 1851 Act. Since the Chumash failed to file claims to the islands and channel beds, they lost them. *Ringrose, supra,* 788 F.2d at 646, Appendix at B-15 ("[W]e conclude that the district court correctly held that the Chumash, claiming a right of occupancy based on aboriginal title, lost all rights in the land when they failed to present a claim to the [1851 land] commissioners").

This legal analysis of aboriginal Indian title is clearly erroneous and in conflict with decisions of the Supreme Court and Court of Claims holding that aboriginal title survived the Mexican cession and must be respected in the area until expressly extinguished by Act of Congress.

III. THE APPEAL PANEL ERRED IN HOLDING THAT THE CHUMASH LOST ALL RIGHTS IN THE ISLANDS AND CHANNEL BEDS BY FAILING TO PRESENT CLAIMS IN THE LAND CONFIRMATION PROCEEDINGS UNDERTAKEN PURSUANT TO THE 1848 TREATY OF GUADALUPE HIDALGO AND 1851 ACT.

A. Background of the 1851 Act.

Congress passed the 1851 Act (Appendix H) to protect the property rights of former Mexican citizens in the newly-acquired territory, i.e., California, and to settle land claims. The Act created a board of three commissioners to determine the validity of claims and required "every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" to present the claim to the commissioners within two years. Appeals could be taken to the Supreme Court. Where a land claim was confirmed, a federal patent was issued and was conclusive between the patentee and the United States, but not binding against the interest of third

parties with superior titles. Any land not claimed within two years, and any land for which a claim was rejected, was deemed "part of the public domain of the United States." *Ringrose, supra,* 788 F.2d at 644-645, Appendix at B-11.

The purpose of the 1851 Act was "to authenticate titles, and to afford the solid guarantee to rights which ensues from their full acknowledgement by the supreme authority." *Ringrose, supra,* 788 F.2d at 645, Appendix at B-11 (citing *United States v. Fossatt,* 62 U.S. (21 How.) 445, 448 (1859)). The goal was "to place the titles to land in California upon a stable foundation, and to give the parties who possess them an opportunity of placing them on the records of the country, in a manner and form that will prevent future controversy." *Ringrose, supra,* 788 F.2d at 645, Appendix at B-11 to B-12 (citing *Fremont v. United States,* 58 U.S. (17 How.) 542, 553-54 (1855)).

The Chumash did not file any aboriginal title claims to Santa Cruz and Santa Rosa Islands under the 1851 Act. Land grants to the islands made to Castillero and the Carrillos were confirmed, however, *Ringrose, supra,* 788 F.2d at 645, Appendix at B-12 (Citing *United States v. Castillero,* 64 U.S. (23 How.) 464 (1860) and *Manuelo Carrillo de Jones v. United States,* (S.D. Coa., Dec. Term 1855) (Unpublished)).

B. Aboriginal title is not a creature of a conquering sovereign, but is rather a principle of international law derived from the doctrine of discovery.

The Appeal Panel's ruling that aboriginal title is a "creature of a conquering sovereign's law," 788 F.2d at 642,

Appendix at B-5, directly conflicts with the Court's opinions in *Fletcher v. Peck, supra,* and *Johnson v. M'Intosh, supra.*

Aboriginal Indian title is derived from the doctrine of discovery and is a principle of international law. In *Fletcher v. Peck, supra,* 20 U.S. (6 Crunch) at 121, the Court ruled that aboriginal Indian title is "a right regulated by treaties, not by deeds of conveyance" and "*depends upon the law of nations* not upon municipal right." [Emphasis Supplied].

The basic reason for the recognition of Indian title as a principle of international law is set forth in *Johnson v. M'Intosh, supra,* as follows:

> The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuant of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. *This principle was that discovery gave title to the government by whose subjects or by whose authority, it was made, against all other European governments, which title might be consumated by possession.* [Emphasis Supplied].

Id., 21 U.S. (8 Wheat.) at 572.

Thus, the Appeal Panel erred in holding that aboriginal title is a creation of the law of the discovering nation, or its successor, rather than a principle of international law.

C. Chumash aboriginal title was not frozen in 1848 when the United States extended its sovereignty to the Mexican Cession area under the Treaty of Guadalupe Hidalgo.

The Appeal Panel's ruling that Chumash aboriginal title was frozen in 1848 when the United States acquired California from Mexico under the Treaty of Guadalupe Hidalgo and extended its sovereignty to the area is clearly erroneous.[9] It directly conflicts with the Court's opinion in *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railway Co., supra,* and the Court of Claims opinion in *Sac and Fox Tribe v. United States,* 383 F.2d 991 (Ct.Cl. 1967).

In *Santa Fe,* the Court ruled that "[r]ecognition of Indian possessory rights by a prior sovereign, such as . . . Mexico and Spain, is not *essential to the validity of such rights under the law of the United States,*" 314 U.S. at 342, and that aboriginal title survived the 1848 cession of territory from Mexico to the United States. *Id.* 314 U.S. at 345-346.

In *Sac and Fox Tribe,* the Indian Claims Commission, similar to the Appeal Panel in this case, found that aboriginal Indian title of the Sac and Fox Tribe was frozen as of April 30, 1803, when the United States acquired Sac and Fox territory from France by virtue of the Louisiana Purchase (8 Stat. 200). The Indian Claims Commission refused to consider post 1803 evidence that would have

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[9]The Appeal Panel distinguished *Cramer v. United States,* 261 U.S. 219 (1923), on the basis that "there was no showing that [the Cramer Indians] had occupied the land as early as 1848, when the Treaty was signed . . ." *Chunie, supra,* 788 F.2d at 646, Appendix at D-2.

established Indian title under United States law and took the position that Indian title could not thereafter be established. *Id.*, 383 F.2d at 997. The Court of Claims reversed on appeal:

> In the case before us, the Indian Claims Commission approved and recognized the right of discovery doctrine with its attribute of sovereign title to land by holding that the United States acquired sovereign title to the lands in question in 1803, by virtue of the Louisiana Purchase from France. In other words, it held that France had sovereign title by right of discovery, subject to the right of use and occupancy by Indians living on it, and we purchased that title in 1803. Inferentially, if there had been any change in Indian title among the Indians using and occupying the land between the time of the French discovery and the French sale to our Government in 1803, such change would have been recognized. But the Commission froze all changes in Indian title as of 1803, and refused to consider any changes between that date and 1824, the date of the Treaty of Cession. If the Commission had been consistent, it would have frozen the date of changes in Indian title as of the date of discovery of the land by the French instead of 1803. The Louisiana Purchase only gave us such title as the French had and there was no addition to the validity of the sovereign title to the land by our purchase of it in 1803—there was no magic to that date.
>
> It would not be in accordance with facts nor history to freeze all Indian titles as of the date of the discovery of America, nor with our own Declaration of Independence in 1776. We know that there was considerable change in such titles after these dates. Consequently, it is not possible to fix any cutoff date for the establishment of Indian title, except the date the Indians lose the land through treaty or otherwise. In

> this case, the date is 1824, the date of cession of the land to the United States by treaty.[10]
>
> By refusing to consider evidence of Indian title acquired after 1803, the Commission took the position, in effect, that since the United States acquired sovereign or legal title from France in 1803, no one, not even the Indians—could acquire any kind of title—not even Indian title—after that date except by grant from the Government itself. Such a position would be correct as to sovereign or legal title, but not as to Indian title.
>
> We think the Commission committed error in refusing to consider the evidence of the tribes as to Indian title acquired by them between 1803 and 1824. Use and occupancy of a portion or of all of the land in question by them between these dates, especially when connected with use and occupancy immediately prior to 1803, could well have been use and occupancy 'for a long time' and sufficient to constitute Indian title to the land.

Id. at 998-999. Accord, *Sioux Nation v. United States*, 23 Ind. Cl. Comm. 419, 423 (1970) ("That a 'long time' ran during the period of United States sovereignty over [an] area rather than during the period of . . . Spanish sovereignty is irrelevant insofar as the perfecting of Indian title is concerned").

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[10]In Paragraph 12 of their amended complaint, the Chumash alleged that "[t]he Chumash people never entered into any treaty, compact, covenants or agreement in which they have voluntarily ceded and divested their aboriginal title to the Spanish Crown, the Spanish Church, or the Republic of Mexico." See *First Amended Complaint*, Docket Entry 9, para. 12. No one disputes in this case that the Chumash never entered into any treaty or agreement by which they ceded their aboriginal territory to Spain, Mexico or the United States.

D. Individual aboriginal title asserted in the Cramer case is indistinguishable from tribal aboriginal title.

There are two types of cases which the Court has considered regarding Indian claims to lands located in California.

The first type of case involves claims by mission Indians claiming titles derived from Spanish and Mexican land grants. The Court twice ruled that Indians asserting claims of this nature were required to file their claim in the land confirmation proceedings undertaken pursuant to the 1851 Act. See *Barker v. Harvey*, 181 U.S. 481 (1901) and *Title Insurance and Trust Co. v. United States*, 265 U.S. 472 (1924). Also see *Summa Corporation v. California ex rel. State Land Commission*, 466 U.S. 198 (1984).

Barker v. Harvey, supra, involved claims to a permanent right of occupancy[11] of lands for which the plaintiffs held confirmed patents. The Court held that the Indians lost any rights they might have had by not presenting their claims to the commissioners under the Act of 1851. The Indians claimed a right of occupancy derived from the Mexican government, and one of the land grants included an express condition that the grantee would "not molest the Indians that thereon may be established." *Id.*,

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[11]The use of this terminology, i.e., "right of occupancy," in *Barker* has caused confusion over the years. As the Appeal Panel correctly noted, the defendants in the *Barker* case "apparently claimed a right of occupancy derived from the Mexican government; in addition, one of the land grants included an express condition that the grantee 'not molest the Indians that thereon may be established." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 645 (9th Cir. 1986), Appendix at B-12 to B-13.

181 U.S. at 482. Either of these facts supports the Court's holding that the Indians rights were "derived from the Mexican government" and subject to the 1851 Act. The Court also concluded that the Indians had abandoned the lands prior to the cession and therefore had no valid right of occupancy. *Id.*, 181 U.S. at 499. This finding also supports the Court's conclusion adverse to the Indians.

Title Insurance, supra, involved a claim to a "perpetual right" to occupy land which the Mexican government had granted and which a confirmed patent had been issued. *Id.*, 265 U.S. at 481. The Court followed its decision in Barker and held that the Indians' claim was lost by failure to present it to the commission. *Id.*, 265 U.S. at 485-86.

Summa Corporation, supra, involved the State of California's obligation to present claims under the 1851 Act in a dispute involving tidelands to which Summa held a confirmed patent derived from a Mexican land grant. The State claimed it acquired an interest in the tidelands upon admission to the union, and that this sovereign right survived the 1851 confirmation proceedings. Citing *Barker* and *Title Insurance,* the Court held that the State's claim must have been presented in the patent proceedings or be barred. *Id.* at 209.

Thus, *Barker* and *Title Insurance,* as interpreted in *Summa Corporation,* stand for one proposition: When mission Indians (and the State of California) claim under title *derived* from the Spanish or Mexican Government.

they had to file their claims in the land confirmation proceedings undertaken pursuant to the 1851 Act.[12]

The second type of case involves claims by Indians based on aboriginal Indian title and not by virtue of title derived from the Spanish or Mexican government. See *Cramer v. United States*, 261 U.S. 219, 231 (1923), where the Court squarely held that "[t]he [1851] act plainly has no application" to individual aboriginal title claims in California and that "[t]he Indians here concerned do not belong to any of the classes described therein, and their claims were in no way derived from the Spanish or Mexican governments."

Cramer involved lands which the Indians had allegedly "occupied . . . continuously since before 1859,"[13] and which had been granted to the defendant's predecessor pursuant to an 1866 statute. *Id.*, 261 U.S. at 225. The Court distinguished *Barker* as a case involving "Mission Indians claiming a right of occupancy derived from the Mexican Government," and concluded that "[t]he Indians

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[12]In this regard, the Appeal Panel noted that "[a]lthough the Court in *Summa* did not have before it the question of whether Indians were required to file claims, the far-reaching holding evidences the Court's conclusion that the land confirmation proceedings were all-encompassing." *United States Ex Rel. Chunie v. Ringrose*, 788 F.2d at 646, Appendix at B-14.

[13]In *Cramer*, the United States asserted on behalf of the Indians that they occupied the disputed tracts of land "prior to 1904 and from time immemorial." The case affected "two individual Indians, remnants of a band that since 1859 have lived in a small valley in Siskiyou County, California" who "have occupied and cultivated and enclosed certain of the lands involved." See *Cramer v. United States*, 276 F. 78, 79 (9th Cir. 1921).

here concerned have no such claim and are not shown to be within the terms of the Act of 1851 in any respect." *Id.*, 261 U.S. at 231.

E. The Chumash claims to aboriginal Indian title are indistinguishable from those asserted in the Cramer case and were never subject to the land confirmation proceedings undertaken pursuant to the 1851 Act.

Although the Appeal Panel correctly set forth the applicable law and correctly interpreted the relevant decisions of this Court, it incorrectly applied the law and court decisions by finding that:

> The Chumash rely primarily on the case of *Cramer v. United States*, 261 U.S. 219, 43 S.Ct. 342, 67 L.Ed. 622 (1923). *Cramer* involved lands which the Indians had allegedly 'occupied . . . continuously since before 1859," and which had been granted to the defendant's predecessor pursuant to an 1866 statute. *Id.* at 255, 43 S.Ct. at 343. The Court distinguished *Barker* as a case involving "mission Indians, claiming a right of occupancy derived from the Mexican Government," and concluded that "[t]he Indians here concerned have no such claim and are not shown to be within the terms of the Act of 1851 in any respect." *Id.* at 231, 43 S.Ct. at 345. Although the Chumash cite *Cramer* in support of their position, their reasoning fails. The Cramer court observed that the Indians in the case before it did not derive their claims from the Spanish or Mexican governments, and that there was no showing that they had occupied the land as early as 1848, when the Treaty was signed, or 1851, when the land confirmation act was enacted. *Id.* These facts explain the court's remark that the Cramer Indians "are not shown to be within the terms of the Act of 1851 in any respect." The Chumash, unlike the *Cramer* Indians, do derive their claim from a right of occupancy existing under

> Spanish or Mexican law, and their right existed well before 1848.

Ringrose, supra, 788 F.2d at 646, Appendix at B-14, D-2.[14]

As noted above, the Appeal Panel ruled that the *Cramer* Indians came into possession of the disputed lands after 1848 and therefore the aboriginal Indian title was derived under United States law, while the Chumas occupied their land *prior* to 1848 and therefore their aboriginal title was derived from Spanish and Mexican law. This novel view is clearly erroneous and conflicts with over a one and one-half centuries of legal precedent. Moreover, it is contrary to *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad Co., supra,* where the Court expressly found that there is no legal distinction between aboriginal title claimed by a tribe and aboriginal title claimed by an individual member of the same tribe:

> [T]he Cramer case assumed that lands within the Mexican cession were not excepted from the policy to

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[14]This language substitutes the language in the original opinion which stated that:

> Although the Chumash cite *Cramer* in support of their position, their reasoning fails. The *Cramer* court observed that the Indians therein had occupied the land "since before 1859," but there is no evidence the Indians occupied the land when the Treaty was signed in 1848 or when the land confirmation act was enacted in 1851. This explains the Court's remark that the *Cramer* Indians "are not shown to be within the terms of the Act of 1851 in any respect." If the Indians in *Cramer* did not occupy the lands in 1851, it follows that the Act of 1851 would not apply to them. *Cramer* does not, therefore, support the Chumash's position.

See Appendix B-14 to B-15.

> respect the Indian right of occupancy. *Though the Cramer case involved the problem of individual Indian occupancy, this Court stated that such occupancy was not to be treated differently from 'the original nomadic tribal occupancy.'* * * * * * * * Perhaps the assumption that aboriginal possession would be respected in the Mexican Cession was, like the generalizations in *Johnson v. M'Intosh*, . . . not necessary for the narrow holding of the case. But generalizations have been so often and so long repeated as respects land under the prior sovereignty of the various European nations including Spain, that like other rules governing title to property . . . they should now be considered no longer open. [Emphasis Supplied].

Id., 314 U.S. at 346.

CONCLUSION

Based on the foregoing, this Court should issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review, and to reverse summarily, its decision below.

RESPECTFULLY SUBMITTED,

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APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 84-4144-DWW (JRx)

UNITED STATES OF AMERICA ex rel. CHUNIE (FRANCES S. HERRERA), and all Chumash descendants similarly situated,

Plaintiffs,

vs.

MARIE RINGROSE, ILDA MCGUINNES, PIER GHERINI, FRANCES GHERINI, THE NATURE CONSERVANCY, a District of Columbia non-profit corporation, SANTA CRUZ ISLAND COMPANY, a California corporation, ALEXANDER LENNOX VAIL, JAMES VAIL WILKINSON, NATHAN RUSSEL VAIL, MARGARET VAIL WOOLLEY, and THE VICKERS COMPANY, LTD., a California Corporation; and the STATE OF CALIFORNIA,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

(Filed November 29, 1984)

Plaintiff Chunie, Frances S. Herrera, has filed this class action on behalf of the Chumash people and their living descendants seeking damages for unlawful trespass and conversion of the Santa Barbara Islands and surrounding channel beds. Plaintiff, a member of the Chumash Indian tribe, claims the Chumash were never divested of aboriginal Indian title to the Santa Barbara Islands.

A full hearing was held in this matter. Upon consideration of all the relevant documents and arguments

raised by counsel for all parties represented at the hearing, this court finds that the sovereign Mexican government's grant of the Santa Barbara Islands (Santa Cruz and Santa Rosa Islands) to private individuals and their perfection of their grants through the proper land commission proceedings effectively extinguished any aboriginal title the Chumash may have enjoyed.

Spain's discovery of California and its conquest of the Indians conferred upon it the exclusive right to extinguish the Indians' aboriginal occupancy rights. The Supreme Court has described aboriginal Indian title as a mere right to occupancy which exists at the will of the discovering sovereignty. *See Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823); *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272 (1955). That right of extinguishment passed to Mexico when it obtained its independence from Spain in 1838. Mexico exercised its sovereign power by granting the Santa Cruz and Santa Rosa Islands to private individuals.

Even if these grants were not sufficient to extinguish all Chumash aboriginal rights in the islands, the United States succeeded to the exclusive right with the signing of the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848), which passed national dominion of all of California, including its adjacent islands, from Mexico to the United States. The Act of 1851, 9 Stat. 631 (1851), implemented the Treaty by providing procedures to ascertain and settle any land claims. The Act mandated that such claims be brought before March 3, 1853. The private individuals filed timely claims, and the Supreme Court and a district court upheld and confirmed their titles to the Santa Cruz

and Santa Rosa Islands, respectively. *See United States v. Castillero,* 64 U.S. (23 How.) 464 (1859); *Manuela Carrillo de Jones v. United States* (December Term 1855). Castillero and Carrillo are predecessors-in-interest to defendants in this action.

The Chumash did not file a claim. Any rights that the Chumash may have had was then extinguished by their failure to proceed with a timely claim in accordance with the requirements of the Act of 1851. *See, e.g., Summa Corp. v. California,* 80 L.Ed.2d 237 (1984); *United States v. Title Insurance and Trust Co.,* 265 U.S. 472 (1924); *Barker v. Harvey,* 181 U.S. 481 (1901).

The State of California received absolute title to the tide and submerged lands surrounding Santa Cruz and Santa Rosa Islands as an incident of its sovereignty. That title is grounded in the state constitution, and it has been confirmed and ratified by later federal legislation and Supreme Court decrees.

Plaintiffs fail to state a claim for which relief can be granted. It is, therefore, ordered that this action be dismissed as to all defendants.

DATED: This 29 day of Nov., 1984.

/s/ David W. Williams,
Senior U.S. District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-5508

D.C. No. CV 84-4144-DWW

UNITED STATES OF AMERICA, ex rel. CHUNIE (FRANCES S. HERRERA), THE BROTHERHOOD OF THE TOMOL, INC., a California corporation, and all Chumash descendants similarly situated,

Plaintiffs-Appellants,

vs.

MARIE RINGROSE, ILDA McGUINNESS, PIER GHERINI, FRANCES GHERINI, THE NATURE CONSERVANCY, a District of Columbia non-profit corporation, SANTA CRUZ ISLAND COMPANY, a California corporation, ALEXANDER LENNOX VAIL, JAMES VAIL WILKINSON, NATHAN RUSSELL VAIL, MARGARET VAIL WOOLLEY, and THE VICKERS COMPANY, LTD., a California Corporation; and the STATE OF CALIFORNIA,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Hon. David W. Williams, Senior District Judge, Presiding
Argued and Submitted December 5, 1985—
Pasadena, California

OPINION

(Filed April 29, 1986)

BEFORE: FLETCHER, PREGERSON, and CANBY, Circuit Judges.

FLETCHER, Circuit Judge:

Plaintiff Chunie, Frances S. Herrera, a Chumash Indian, and plaintiff the Brotherhood of the Tomol, Inc., representing the coastal band of Chumash Indians in its governmental capacity, appeal the district court's dismissal of their claim for unlawful trespass and conversion of the Santa Barbara Islands and surrounding channel beds. The plaintiffs allege that they were never divested of their aboriginal Indian title to the islands. The individually named defendants and the three organizational defendants claim ownership of the islands. Defendant State of California claims title to the channel beds surrounding the islands. The district court granted the defendant's motion to dismiss, holding that the Chumash had failed to state a claim for which relief can be granted. We affirm the holding, although on grounds somewhat different from those relied upon by the district court.

FACTS

Plaintiff Chunie, Frances S. Herrera, is a Chumash Indian. She alleges that from time immemorial, the Chumash people have occupied the Santa Barbara Islands, i.e., Santa Cruz and Santa Rosa Islands, and the surrounding channel beds. Plaintiff The Brotherhood of the Tomol, Inc. represents the coastal band of Chumash Indians in its governmental capacity. Plaintiffs are hereinafter referred to collectively as the Chumash.

Santa Cruz and Santa Rosa Islands are two of the channel islands lying off the Santa Barbara coast, each covering about 50,000 acres. Spain acquired the islands by conquest and colonization, and the islands passed to Mexico when it obtained its independence from Spain.

In the 1830's and 1840's, the Mexican government granted Santa Rosa Island to Antonio and Carlos Carrillo and granted Santa Cruz Island to Andres Castillero. The individual and organizational defendants claim title derived from that of the Carrillos and Castillero. The Chumash contend that the Mexican land grants did not extinguish aboriginal title and were made subject to the Indians' right of occupancy.

The Treaty of Guadalupe Hidalgo, signed on February 2, 1848 and entered into force on May 30, 1848, signaled the formal end of the Mexican-American War. 9 Stat. 922 (1848). Under the treaty, Mexico ceded California to the United States, art. V, 9 Stat. at 926, but the Chumash contend the islands were not included in the ceded area. Despite this contention, the Chumash argue that the treaty converted their aboriginal title into recognized title protected by the fifth amendment.

To settle land claims in the newly acquired territory, Congress passed the Act of March 3, 1851, ch. 41, 9 Stat. 631 (1851). The Act created a board of commissioners to determine the validity of claims, and required every person "claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" to present the claim within two years. Castillero, and the successor-in-interest to the Carrillos, presented claims which were upheld by the courts. *See United States v. Castillero,* 64 U.S. (23 How.) 464 (1860); *Manuelo Carrillo de Jones v. United States* (S.D. Cal., Dec. Term. 1855) (unpublished). The Chumash argue that even if the islands were included in the ceded area, the Act of 1851 did not apply to Indian claims based on aboriginal title, and

Indians were excepted from the land confirmation proceedings.

In addition to claiming an interest in Santa Cruz and Santa Rosa Islands, the Chumash also allege ownership of the surrounding channel beds. As with the islands, the Chumash contend they have occupied the channel beds from time immemorial, that their aboriginal title has never been extinguished, and that the state did not acquire title to the channel beds.

The Chumash instituted this suit in district court seeking declaratory relief, damages for trespass and conversion, injunctive relief, and attorney's fees. They named as defendants eight individuals and three organizations who claim interests in Santa Cruz and Santa Rosa Islands, and the State of California which claims ownership of the channel beds. On motions by the defendants, the district court held that the plaintiffs failed to state a claim for which relief can be granted, and dismissed the action. The Chumash filed a timely appeal. On the appeal, all parties request attorney's fees under 42 U.S.C. § 1988.

DISCUSSION

1. The Mexican government's grant of Santa Cruz and Santa Rosa Islands to private individuals did not extinguish the Indians' aboriginal title.

Indians' aboriginal title derives from their presence on the land before the arrival of white settlers. *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272, 279 (1955). After conquest by European powers, Indians were permitted to occupy territory over which they had previously exercised "sovereignty." This right is not an ownership

right, but is rather a right of occupancy granted by the conquering sovereign, *id.*, referred to as "original Indian title," "aboriginal Indian title," or simply "Indian title." *Felix S. Cohen's Handbook of Federal Indian Law* 487 (1982 ed.) [hereinafter cited as Cohen].[1] The right is therefore necessarily a creature of the conquering sovereign's law. Because the parties have offered no evidence or argument that the Spanish or Mexican law of aboriginal title differs from our own, we will assume that it does not. Aboriginal title entitles the tribes to full use and enjoyment of the surface and mineral estate, and to resources, such as timber, on the land. *See id.* at 491. Despite this right of occupancy, the conquering government acquires the exclusive right to extinguish Indian title. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543,587 (1823). Extinguishment of aboriginal title does not create a legal obligation to pay compensation to the Indians. *Tee-Hit-Ton*, 348 U.S. at 290-91.

Under the principle of *Johnson v. M'Intosh*, Spain's discovery and conquest of the Californias conferred upon Spain the right as sovereign to extinguish the Indians' aboriginal title. When Mexico obtained its independence from Spain, Mexico acquired this right to extinguish aboriginal title. The first issue in the case at bar is whether Mexico's land grants to private individuals constituted such extinguishment.

The Supreme Court has held that "an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian

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[1] Aboriginal Indian title differs from recognized Indian title. Recognized title exists where Congress by treaty or other agreement has declared that the Indians are to hold the lands permanently. *Tee-Hit-Ton*, 348 U.S. at 277-78; Cohen, *supra*, at 486.

wards." *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354 (1941). Although the Court in *Santa Fe* was referring to extinguishment by the United States government, the same caution may be applied in analyzing whether the Mexican government extinguished aboriginal title.

The methods available to extinguish aboriginal title have never been explicitly enumerated. The court in *Johnson* provided that extinguishment could be "either by purchase or by conquest." 21 U.S. (8 Wheat.) at 587. In *Santa Fe*, the court recognized the United States' right to extinguish Indian title "whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." 314 U.S. at 347. A grant of Indian-occupied land by the government to an individual does not, however, constitute extinguishment.

In *Johnson v. M'Intosh*, the Supreme Court held that the European discoverers inherited the power to grant lands occupied by Indians. 21 U.S. (8 Wheat.) at 574. The Court recognized, however, that "[t]hese grants have been understood by all, to convey a title to the grantees, *subject only to the Indian right of occupancy.*" *Id.* (emphasis added). Other cases have similarly recognized that land grants were valid to convey the fee, but that the grantee took title subject to the Indians' right of occupancy. *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877) ("The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians . . . ."); *Clark v. Smith*, 38 U.S. (13 Pet.) 195, 201 (1839). The same principle applies to land grants by foreign sovereigns. *See Chouteau v. Molony*, 57 U.S. (16 How.) 203, 239 (1853) (land grants by the

Spanish governors were made subject to the rights of Indian occupancy).

Based on this rule reaffirmed repeatedly by the Supreme Court, the Mexican land grants to Castillero and the Carrillos did not effect an extinguishment of the Chumash's aboriginal title. In holding otherwise, the district court erred. Castillero and the Carrillos, and their successors-in-interest, took the islands subject to the Chumash's right of occupancy.

2. The Santa Barbara Islands were within the territory ceded by Mexico to the United States under the Treaty of Guadalupe Hidalgo.[2]

The Treaty of Guadalupe Hidalgo was signed on February 2, 1848 and entered into force on May 30, 1848. 9 Stat. 922, TS No. 207. Article V of the treaty defines the boundary line between the United States and Mexico. 9 Stat. at 926-28. The California coastal islands are not explicitly mentioned.

The absence of any specific reference in the treaty to the islands is explained by the fact that the treaty drafters

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[2] The Chumash contend that the islands were not within the ceded area, and argue that on a motion to dismiss, the district court was obligated to accept this allegation as true. While the court generally must assume factual allegations to be true, it need not assume the truth of legal conclusions cast in the form of factual allegations. *See Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981); *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1097 (9th Cir., 1976), *cert. denied*, 429 U.S. 1121 (1977). The interpretation of a treaty is a question of law and not a matter of fact. *Strong v. United States*, 518 F.2d 556, 563 (Ct. Cl.), *cert. denied*, 423 U.S. 1015 (1975). In light of the Supreme Court's statement in *United States v. California*, discussed *infra*, this issue is settled as a matter of law.

were primarily concerned with the latitudinal boundary between the two countries. As one historian observed: "In the treaty, as a matter of fact, the territory ceded is not mentioned. The treaty is content to specify the boundary." Bowman, *The Question of Sovereignty Over California's Off-Shore Islands,* 31 Pac. Hist. Rev. 291, 295 (1962). After reviewing available evidence on the question, Bowman concludes: "The territorial consequences were well understood at the time. . . . Neither the United States nor Mexico has ever contested [the inclusion of the islands as part of California] . . . . [T]here seems never to have been uncertainty of intent or understanding as to the side of the line on which they lay." *Id.* at 301.

Two maps are mentioned in the second paragraph of article V, with copies attached to the treaty. One map shows the islands and the other does not, but neither appears particularly helpful because the maps are included for specific, limited purposes. The Disturnell map (which includes the islands) is referred to for the specific purpose of identifying "the southern and western limits of New Mexico." 9 Stat. at 926. The Pantoja map (on which no islands are shown) clarifies the "limit separating Upper from Lower California" in the vicinity of San Diego. *Id.* at 927. Although each party argues strenuously in favor of the map supporting its position, neither map is conclusive.

The Supreme Court answered the question in 1978 in *United States v. California,* 436 U.S. 32 (1978). At issue in that case was whether the federal government or the state had dominion over the submerged lands and waters within the Channel Islands National Monument. The national monument encompasses two large and many smaller islands in the same vicinity as the islands at issue in the case at bar.

In its discussion, the Court stated: "Federal title to the islands can be traced to the 1848 Treaty of Guadalupe Hidalgo, 9 Stat. 922, by which Mexico ceded to the United States the islands lying off the coast of California, along with the adjacent mainland." *Id.* at 34 n.3.

The Chumash argue this statement is "mere obiter dictum," claiming that the queston of inclusion of the islands within the ceded area was not before the court. Although apparently neither party in *United States v. California* argued that the islands had been excluded in the cession, the Court's statement is definitive. It is an integral link in the chain by which the Court held that California exercised dominion over the waters in the national monument. Had the islands not been ceded to the United States in 1848, the federal government would have had no authority to transfer to California dominion over the surrounding submerged lands and waters under the Submerged Lands Act. *See id.* at 37. The Supreme Court's statement in footnote 3 of the opinion is thus part of the Court's holding and resolves the question of the islands' inclusion in the ceded territory.

3. The Treaty of Guadalupe Hidalgo did not convert the Chumash's aboriginal title into recognized title.

Despite the Chumash's contention that the Santa Barbara Islands were not included in the territory ceded under the Treaty of Guadalupe Hidalgo, the Indians claim their title became recognized pursuant to articles VIII and IX of the treaty. The district court did not address this claim. Article VIII of the treaty provided that Mexicans "now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States" could elect either nation's citizenship, and

if no election were made within one year, would become United States citizens. 9 Stat. at 929. Under Article IX, persons not choosing to remain Mexican citizens "shall . . . be admitted . . . to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution." *Id.* at 930. Without citing any relevant authority, the Chumash state in their opening brief: "Thus, the aboriginal title of the Chumash Indians to the Islands came to be recognized by Article VIII and IX of the 1848 Treaty of Guadalupe Hidalgo."

In their briefs, the defendants point out the inconsistencies of the Chumash's arguments that the treaty did not convey the islands from Mexico to the United States, but that it nevertheless did confer citizenship and property rights on the Chumash. The Chumash explain in their reply brief that this result is possible because "[the Chumash] regularly commuted between the mainland and Islands. . . . [T]he rights conferred by Article[s] VIII and IX [of the treaty] were applicable to them *as people* (and not through inclusion of the Islands in the cession area)." They again cite no authority in support of their position.

The Chumash's contention is novel and creative, but does not appear to have any merit. For Indian title to be recognized, "Congress, acting through a treaty or statute, . . . must grant legal rights of permanent occupancy within a sufficiently defined territory. . . . There must be an intention to accord or recognize a *legal* interest in the land." *Sac and Fox Tribe of Indians v. United States,* 315 F.2d 896, 897 (Ct. Cl.), *cert. denied,* 375 U.S. 921 (1963). We conclude that the treaty did not convert the Chumash's aboriginal title into recognized title.

4. The Chumash lost all rights in the islands when they failed to present claims in the land confirmation proceedings undertaken pursuant to the Treaty of Guadalupe Hidalgo and the Act of 1851.

To protect property rights of former Mexican citizens in the newly-acquired territory and to settle land claims, Congress passed the Act of March 3, 1851, ch. 41, 9 Stat. 631. The Act created a board of three commissioners to deterimne the validity of land claims in California, and required "every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" to present his or her claim to the commissioners within two years. *Id.* §§ 1, 8, 13. Appeals from the commissioners' decisions were permitted to the district court and, ultimately, to the Supreme Court. *Id.* §§ 9, 10. Where a land claim was confirmed, a federal patent was issued. *Id.* § 13. A patent was conclusive between the patentee and the United States, but not binding against the interests of third parties with superior title. *Id.* § 15; *Barker v. Harvey,* 181 U.S. 481, 491 (1901) (citing *Beard v. Federy,* 70 U.S. (3 Wall.) 478, 492-93 (1866)). Any land not claimed within two years, and any land for which a claim was finally rejected, was deemed "part of the public domain of the United States." Act of 1851, ch. 41, § 13.

The purpose of the Act of 1851 was "to authenticate titles, and to afford the solid guarantee to rights which ensues from their full acknowledgment by the supreme authority." *United States v. Fossatt,* 62 U.S. (21 How.) 445, 448 (1859). The goal was "to place the titles to land in California upon a stable foundation, and to give the parties who possess them an opportunity of placing them

on the records of the country, in a manner and form that will prevent future controversy." *Fremont v. United States,* 58 U.S. (17 How.) 542, 553-54 (1855); *accord Thompson v. Los Angeles Farming and Milling Co.,* 180 U.S. 72, 77 (1901).

The land grants made by the Mexican government to Castillero and the Carrillos were confirmed under the provisions of the Act of 1851. *United States v. Castillero,* 64 U.S. (23 How.) 464 (1860); *Manuelo Carrilio de Jones v. United States,* (S.D. Cal., Dec. Term 1855) (unpublished). The Chumash did not file any claims under the Act. The Chumash contend, however, that the confirmation of the Mexican grants did not extinguish their aboriginal title because Indians claiming aboriginal rights were not required to file claims under the Act of 1851. The Act required persons claiming lands "by virtue of any right or title derived from the Spanish or Mexican government" to file claims. Because aboriginal title is not "derived from the Spanish or Mexican government," the Chumash argue that they were not required to file.

In several cases, the Supreme Court has addressed the issue of whether Indians were required to file claims under the Act of 1851. In *Barker v. Harvey,* 181 U.S. 481 (1901), mission Indians claimed a right of permanent occupancy of lands for which the plaintiffs held confirmed patents. The Court held that the Indians lost any rights they might have had by not presenting claims to the commissioners under the Act of 1851. *Id.* at 491-92. The precise basis for this holding is not clear. As "mission Indians," the defendants apparently claimed a right of occupancy derived from the Mexican government; in addi-

tion, one of the land grants included an express condition that the grantee "not molest the Indians that thereon may be established." *See id.* at 482, 493. Either of these facts would support the Court's holding on the basis that the Indians' rights were "derived from the Mexican government" and thus subject to the filing requirement of the Act of 1851. The Court also concluded that the Indians had abandoned the lands prior to the cession and therefore had no valid right of occupancy. *Id.* at 499. This finding would likewise support the Court's holding adverse to the Indians.

Twenty-three years later the Court reaffirmed the *Barker* decision in *United States v. Title Insurance and Trust Co.*, 265 U.S. 472 (1924). In *Title Insurance*, mission Indians claimed a "perpetual right" to occupy land which the Mexican government had granted and for which a confirmed patent had been issued. *Id.* at 481. The Court followed its decision in *Barker* and held that the Indians' claim was lost by the failure to present it to the commission. *Id.* at 485-86. Although not entirely clear in the opinion, the Court in a later decision observed that the Indians in *Title Insurance* "claimed an aboriginal right of occupancy." *See Summa Corp. v. California ex rel. State Lands Commission*, 466 U.S. 198, 208 (1984).

This same principle was applied to non-mission Indians in *Super v. Work*, 3 F.2d 90 (D.C. Cir. 1925), *aff'd per curiam*, 271 U.S. 643 (1926). The Court of Appeals observed that *Barker* and *Title Insurance* involved mission Indians while *Super* concerned "*Indians* [who] were merely roving bands," 3 F.2d at 91, but found the distinction irrelevant. The Supreme Court summarily af-

firmed, citing *Barker* and *Title Insurance* as authority. 271 U.S. 643.

In 1984, the Court addressed the State of California's obligation under the Act of 1851 to present land claims to the commission. *Summa Corp. v. California ex rel. State Lands Commission*, 466 U.S. 198 (1984). In dispute were tidelands to which Summa held a confirmed patent derived from a Mexican land grant. California claimed it had acquired an interest in the tidelands upon its admission to the union, and contended that this sovereign right survived the land confirmation proceedings. Citing *Barker* and *Title Insurance*, the Court held that California's claim must have been presented in the patent proceedings or be barred. *Id.* at 209. Although the Court in *Summa* did not have before it the question of whether Indians were required to file claims, the far reaching holding evidences the Court's conclusion that the land confirmation proceedings were intended to be all-encompassing.

The Chumash rely primarily on the case of *Cramer v. United States*, 261 U.S. 219 (1923). *Cramer* involved lands which the Indians had allegedly "occupied . . . continuously since before 1859." and which had been granted to the defendant's predecessor pursuant to an 1866 statute. *Id.* at 225. The Court distinguished *Barker* as a case involving "Mission Indians, claiming a right of occupancy derived from the Mexican Government," and concluded that "[t]he Indians here concerned have no such claim and are not shown to be within the terms of the Act of 1851 in any respect." *Id.* at 231. Although the Chumash cite *Cramer* in support of their position, their reasoning fails. The *Cramer* court observed that the In-

dians therein had occupied the land "since before 1859," but there is no evidence the Indians occupied the land when the Treaty was signed in 1848 or when the land confirmation act was enacted in 1851. This explains the Court's remark that the *Cramer* Indians "are not shown to be within the terms of the Act of 1851 in any respect." If the Indians in *Cramer* did not occupy the lands in 1851, it follows that the Act of 1851 would not apply to them. *Cramer* does not, therefore, support the Chumash's position.

Given the line of Supreme Court decisions recognizing the extensive reach of the Act of 1851, we conclude that the district court correctly held that the Chumash, claiming a right of occupancy based on aboriginal title, lost all rights in the land when they failed to present a claim to the commissioners. When Andres Castillero and Manuelo Carrillo de Jones filed claims with the commissioners based on their land grants from the Mexican government, and had their titles confirmed and received federal patents to their lands, they were entitled to believe that adverse claims to their lands had been eliminated. This result comports with the overriding purpose of the Act of 1851 "to place the titles to land in California upon a stable foundation . . . in a manner and form that will prevent future controversy." *Fremont v. United States*, 58 U.S. (17 How.) 542, 553-54 (1855).

5. The Chumash do not possess any interest in the channel beds surrounding Santa Cruz and Santa Rosa Islands.

In addition to claiming rights in Santa Cruz and Santa Rosa Islands, the Chumash also claim rights in the

surrounding tidelands and submerged lands — the channel beds.[3] They allege that the State of California has unlawfully trespassed on the channel beds, has unlawfully leased the right to take minerals therefrom, and has converted the proceeds to its own use.

The Supreme Court has held that claims to tidelands and submerged lands were cognizable under the Act of 1851. *See Summa*, 466 U.S. at 205; *United States v. Coronado Beach Co.*, 255 U.S. 472, 487-88 (1921). Thus, by failing to present a claim to the commissioners, the Chumash lost all rights in the channel beds as well as in the islands themselves.[4]

6. Principles of international law do not provide additional support for the Chumash's claims.

In addition to basing their claims on the United States Constitution, federal statutes and regulations, and

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[3] The Chumash in their complaint allege title to Santa Cruz and Santa Rosa Islands "and surrounding channel beds," but do not define "surrounding channel beds." The State of California in its brief states: "For purposes of this brief, California assumes that [the term "surrounding channel beds"] mean[s] the tidelands underlying the Pacific Ocean within three geographical miles seaward from the coastline of Santa Cruz and Santa Rosa Islands." Because the Chumash do not refute this assumption in their reply brief, we accept this assumption. The terms "channel beds," "tidelands," and "submerged lands" are used interchangeably by the parties and in this opinion.

[4] The parties present a variety of arguments on this issue based on other statutory and case authority, including the equal footing doctrine, the Submerged Lands Act, the Indian Non-Intercourse Act, the Northwest Ordinance of 1787, the 1928 Jurisdictional Act and the *Indians of California* cases in the Court of Claims, and the Indian Claims Commission Act and the case of *Thompson v. United States* brought as a representative action on behalf of the "Indians of California." Because the authorities discussed above dispose of this issue, we need not consider these additional arguments.

the Treaty of Guadalupe Hidalgo, the Chumash state that their case arises under "international law relating to the construction of treaties, determination of boundaries, and state succession, as incorporated by federal common law." In their briefs, the Chumash cite a variety of international law authorities including the Charter of the United Nations; the International Bill of Human Rights consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights; the American Convention on Human Rights; the American Declaration of Rights and Duties of Man; and the Vienna Convention on the Law of Treaties.

Based on our conclusion that the Chumash lost any rights in the islands by not filing claims under the Act of 1851, we need not address these additional arguments. In *Barker v. Harvey*, 181 U.S. 481 (1901), in which the Court held that mission Indians lost their rights by not presenting claims to the commissioners, the Court mentioned the role of international law:

> Undoubtedly by the rules of international law, and in accordance with the provisions of the treaty between the Mexican government and this country, the United States were bound to respect the rights of private property in the ceded territory. But such obligation is entirely consistent with the right of this Government to provide reasonable means for determining the validity of all titles within the ceded territory, to require all persons having claims to lands to present them for recognition, and to decree that all claims which are not thus presented shall be considered abandoned.

Id. at 486-87. The Supreme Court thus concluded that the requirements imposed by the Act of 1851 were consistent

with rules of international law. Furthermore, all the international law authorities cited by the Chumash were adopted since 1945, and therefore cannot logically affect the operation of the Act of 1851. Principles of international law do not warrant changes in any of the foregoing analysis.

7. The defendants are not entitled to an award of attorney's fees on this appeal.

All parties seek attorney's fees on appeal under 42 U.S.C. § 1988. Although attorney's fees may be awarded at the appellate as well as the trial level, *Sotomura v. County of Hawaii*, 679 F.2d 152 (9th Cir. 1982), a prevailing defendant is entitled to an award of fees only where the plaintiff's action was "frivolous, unreasonable, or without foundation." *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)); *Jensen v. Stangel*, 762 F.2d 815, 817 (9th Cir. 1985). The Chumash raise issues not previously addressed by the courts, and their case cannot be characterized as frivolous or unreasonable. We therefore deny all requests for attorney's fees.

AFFIRMED.

APPENDIX C

AUG 14 1986

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-5508

DC CV 84-4144-DWW

UNITED STATES OF AMERICA, es rel
CHUNIE (FRANCES S. HERRERA), et al.,

Plaintiffs/Appellants,

vs.

MARIE RINGROSE, ILDA McGUINNESS, PIER GHERINI, FRANCES GHERINI, THE NATURE CONSERVANCY, et al.,

Defendants/Appellees.

JUDGMENT

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 29, 1986.

Costs taxed in the amount: $385.50

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85 5508

D.C. No. CV 84-4144-DWW

UNITED STATES OF AMERICA, ex rel. CHUNIE ((FRANCES S. HERRERA), THE BROTHERHOOD OF THE TOMOL, INC., a California corporation, and all Chumash descendants similarly situated,

Plaintiffs-Appellants,

vs.

MARIE RINGROSE, ILDA McGUINNESS, PIER GHERINI, FRANCES GHERINI, THE NATURE CONSERVANCY, a District of Columbia non-profit corporation, SANTA CRUZ ISLAND COMPANY, a California corporation, ALEXANDER LENNOX VAIL, JAMES VAIL WILKINSON, NATHAN RUSSELL VAIL, MARGARET VAIL WOOLLEY, and THE VICKERS COMPANY, LTD., a California Corporation; and the STATE OF CALIFORNIA,

Defendants-Appellees.

ORDER AMENDING OPINION

(Filed May 5, 1986)

Before: FLETCHER, PREGERSON, and CANBY, Circuit Judges.

The following language is substituted in the opinion filed April 29, 1986, in place of page 15, lines 12-20 ("The *Cramer* . . . position.")

The *Cramer* court observed that the Indians in the case before it did not derive their claims from the Spanish or Mexican governments, and that there was no showing that they had occupied the land as early as 1848, when the Treaty was signed, or 1851, when the land confirmation act was enacted. *Id.* These facts explain the court's remark that the *Cramer* Indians "are not shown to be within the terms of the Act of 1851 in any respect." The Chumash, unlike the *Cramer* Indians, do derive their claim from a right of occupancy existing under Spanish or Mexican law, and their right existed well before 1848.

APPENDIX E

Case No.: 85-5508

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA ex rel. CHUNIE (FRANCES S. HERRERA); THE BROTHERHOOD OF THE TOMOL, INC., a California non-profit corporation, and all Chumash descendants similarly situated,

Plaintiffs-Appellants,

vs.

MARIE RINGROSE, ILDA MCGUINNES, PIER GHERINI, FRANCES GHERINI, THE NATURE CONSERVANCY, a District of Columbia non-profit corporation, SANTA CRUZ ISLAND COMPANY, a California corporation, ALEXANDER LENNOX VAIL, JAMES VAIL WILKINSON, NATHAN RUSSEL VAIL, MARGARET VAIL WOOLEY, and THE VICKERS COMPANY, LTD., a California corporation; and the STATE OF CALIFORNIA,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Honorable David W. Williams, Presiding

PETITION OF PLAINTIFFS-APPELLANTS UNITED STATES OF AMERICA EX REL. CHUNIE, (FRANCES S. HERRERA) ET AL., FOR REHEARING

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Case No.: 85-5508

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA ex rel. CHUNIE (FRANCES S. HERRERA); THE BROTHERHOOD OF THE TOMOL, INC., a California non-profit corporation, and all Chumash descendants similarly situated,

Plaintiffs-Appellants,

vs.

MARIE RINGROSE, ILDA McGUINNESS, PIER GHERINI, FRANCES GHERINI, THE NATURE CONSERVANCY, a District of Columbia non-profit corporation, SANTA CRUZ ISLAND COMPANY, a California corporation, ALEXANDER LENNOX VAIL, JAMES VAIL WILKINSON, NATHAN RUSSEL VAIL, MARGARET VAIL WOOLLEY, and THE VICKERS COMPANY, LTD., a California Corporation; and the STATE OF CALIFORNIA,

Defendants-Appellees.

D.C. No. CV 84-4144DWW

PETITION OF PLAINTIFFS-APPELLANTS UNITED STATES OF AMERICA EX REL. CHUNIE, ET. AL. FOR REHEARING

TO: THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Petitioners United States of America Ex Rel. Chunie, et al., (hereinafter "the Chumash") hereby petition the United States Court of Appeals for the Ninth Circuit for a rehearing in the above-captioned appeal pursuant to

Rule 40 of the Federal Rules of Appellate Procedure. The grounds for this petition are set forth in the Argument below.

INTRODUCTION

The undersigned counsel for Petitioners hereby states a belief, based on a reasoned and studied professional judgment, that: (1) material facts and law were overlooked in the Appeal Panel's April 29, 1986 Opinion, as amended by the May 5, 1986 Order Amending Opinion, and (2) the findings of the Appeal Panel in regards to the factual situation in the *Cramer* case is contrary to the facts found in the Ninth Circuit's opinion in that case.

ARGUMENT

1. THE CHUMASH'S ABORIGINAL TITLE SURVIVED THE 1848 MEXICAN CESSION AND WAS RECOGNIZED UNDER AMERICAN LAW WHEN THE 1851 ACT WAS PASSED; THEIR TITLE IS THEREFORE IDENTICAL TO THE ABORIGINAL TITLE ASSERTED BY THE INDIANS IN THE CRAMER CASE.

The Appeal Panel indicated that if the Chumash Indians were in a similar circumstance to the California Indians in *Cramer v. United States,* 261 U.S. 219 (1923), they would not be subject to the land confirmation proceedings under the 1851 Act. 9 Stat. 631. The Appeal Panel distinguished *Cramer* on the basis that "*Cramer* involved lands which the Indians allegedly 'occupied . . . . continuously since before 1859,' and which had been granted to the defendant's predecessor pursuant to an 1866 statute" and did not claim "a right of occupancy derived

from the Mexican Government'' as did the Indians in *Barker v. Harvey,* 181 U.S. 481 (1901). See *United States of America ex rel. Chunie v. Ringrose,* Slip Opinion No. 85-5508 (9th Cir., April 29, 1986), p. 15. Thus, the Appeal Panel concluded in an order amending its Opinion that the Chumash are different and distinguishable from the *Cramer* Indians and subject to the 1851 Act:

> The *Cramer* court observed that the Indians in the case before it did not derive their claims from the Spanish or Mexican Governments, and that there was no showing that they had occupied the land as early as 1848, when the Treaty was signed, or 1851, when the land confirmation act was enacted. *Id.* These facts explain the court's remark that the *Cramer* Indians 'are not shown to be within the terms of the Act of 1851 in any respect.' *The Chumash, unlike the Cramer Indians, do derive their claim from a right of occupancy existing under Spanish or Mexican law, and their right existed well before 1848.* [Emphasis Supplied].

See *United States of America ex rel. Chunie v. Ringrose,* Order Amending Slip Opinion No. 85-5508 (9th Cir., May 5, 1986).

In making its finding that the Chumash are unlike the Cramer Indians because their right of occupancy existed well before 1848 and is derived from Spanish or Mexican law, the Appeal Panel overlooked important material facts alleged in the Chumash's Amended Complaint that ''[f]rom time immemorial, the Chumash people have occupied the islands and surrounding channel beds,'' that ''[e]ach and every part of this territory was used for and was essential to the subsistence and religious observances of the Chumash people,'' and that the Chumash ''continue to hold . . . unex-

tinguished aboriginal Indian title . . . to the subject lands and territory *up to and including the date of filing this amended complaint.*" [Emphasis Supplied].

For purposes of a Rule 12 (b) (6) motion, these material allegations of fact should have been accepted as true. *Western Mining Council v. Watt,* 643 F.2d 618, 624 (9th Cir.), *cert. denied,* 454 U.S. 1081; *United States v. Tulare Lake Canal Co.,* 535 F.2d 1093, 1097 (9th Cir. 1976), *cert. denied,* 429 U.S. 1121 (1977). These material facts are contrary to the Appeal Panel's finding that Chumash aboriginal title was *frozen* as of 1848 when the Treaty of Guadalupe Hidalgo (9 Stat. 922) went into effect and that Chumash aboriginal title is therefore derived from Spanish or Mexican law. These facts in the Amended Complaint indicate that Chumash aboriginal title continued subsequent to the 1848 Act under the laws of the United States and were *recognized and derived from* the Laws of the United States when the 1851 Act was passed, i.e., between 1848 and 1851. See *United States v. Santa Fe Pacific Railroad Co.,* 314 U.S. 339, 342 (1941) ("Recognition of Indian possessory rights by a prior sovereign, such as . . . Mexico, and Spain, is not essential to the validity of such rights under the laws of the United States").

Moreover, the findings of the Appeal Panel in regards to the facts in the *Cramer* case are also in apparent conflict with the findings of fact in the Ninth Circuit's decision in *Cramer* where the United States asserted "that for years prior to 1904 and from time immemorial the Indians occupied and claimed the [disputed] lands." After stating this fact, the court found that "[t]his case affects two individual Indians, remnants of a band that since 1859 have lived in a small valley in Siskiyou County, California. The

Indians have occupied and cultivated and enclosed *certain of the lands involved.*" [Emphasis Supplied]. What the court found was that the band the *Cramer* Indians belonged to claimed aboriginal title to the territory in which the lands are located, but that two individual members of the band began occupying the particular tracts within the aboriginal territory area since at least 1859. *Cramer v. United States*, 276 F. 78, 79 (9th Cir. 1921). These facts are on all fours with the facts asserted by the Chumash.

As noted in the Chumash's Reply Brief, p. 6 n. 5. "In this case plaintiffs are claiming *both* individual aboriginal title and aboriginal title as a band." Thus, like the *Cramer* Indians, the Chumash assert that, as a band, they have aboriginal title to the area involving Santa Cruz and Santa Rosa Islands and surrounding Channel beds and that individual members of the Tribe are presently occupying portions of the Islands and channel beds area for subsistence and religious purposes.

Thus, the facts involving the Chumash are identical to the facts in the *Cramer* case insofar as they relate to individual aboriginal title. They are also identical to the facts in *United States v. Dann*, 706 F.2d 919 (9th Cir. 1983), where the court found that *a group* of Western Shoshone Indians retained aboriginal title to a tract of land within the 1848 Mexican cession area and could assert it as a defense in a trespass action. *Id.* at 933.

II. THE APPEAL PANEL'S INTERPRETATION OF THE 1851 ACT AS EXTINGUISHING CHUMASH ABORIGINAL TITLE BY FAILURE TO CONFIRM SUCH TITLE UNDER THE 1851 ACT IS CONTRARY TO THE RULES OF STATUTORY CONSTRUCTION THAT VAGUE AND AMBIGUOUS STATUTES REGARDING INDIANS MUST BE LIBERALLY CONSTRUED AND INTERPRETED IN THEIR FAVOR.

It is clear that the 1851 Act contains no language expressly extinguishing the aboriginal title of the Chumash Indians and that, in so far as it requires Indians claiming aboriginal title to perfect land claims with the 1851 Land Commission, it is vague and ambiguous. In construing the Act, the Appeal Panel strictly construed it against the Chumash. This is contrary to Ninth Circuit decisions, that statutes regarding Indians are to be construed liberally in their favor. See e.g., *United States v. Dann*, 706 F.2d 919, 931 (9th Cir. 1983). Accord, *White Mountain Apache Tribe v. Bracker*, 65 L.Ed.2d 665, 673 (1980).

There is no question that the 1851 Act as it pertains to Indians is vague and ambiguous. See *United States v. Gemmill*, 535 F.2d 1145, 1149 (9th Cir. 1976) (1851 Act referred to by the Ninth Circuit as "ambiguous Act of 1851)." Thus, the Appeal Panel should have applied the rule "that doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 354 (1941) (*quoting Choate v. Trapp*, 224 U.S. 665, 675 (1912)).

Under the rule of liberal construction, the Appeal Panel should have construed the 1851 Act in favor of the Chu-

mash. Under this rule, the Appeal Panel could not have found that the Chumash's aboriginal title was subject to the land confirmation proceedings under the 1851 Act. First, an intent to extinguish must be expressed and cannot be lightly implied. *United States v. Dann*, 706 F.2d 919 (9th Cir. 1983), rev. on other grounds, 105 S.Ct. 1058 (1985) (*citing United States v. Santa Fe R.R. Co.*, 314 U.S. at 354). No such expression on the part of Congress exists in the Act. Secondly, construing the Act liberally in favor of the Indians, the Appeal Panel would have had to find that the Chumash were not subject to the land confirmation proceedings under the 1851 Act since:

(1) They were wards of the United States Government in 1851. See *Cramer v. United States*, 262 U.S. 219, 232 (1922) ("Indian tribes are wards of the nation, —communities dependent on the nation".) There is a fiduciary duty on the part of the United States to protect its wards. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (Courts have imposed the fudiciary obligation of a private trustee on United States when dealing with Indians); *Navajo Tribe v. United States*, 364 F.2d 320, 322-24 (Ct.Cl. 1966) (The United States, when administering Indian property, is bound by the same principals of law as it be applied to an ordinary fiduciary). The 1851 Act must be construed in light of these fiduciary obligations. Since the United States would have had a duty of loyalty to the Chumash to protect their aboriginal title in 1851, the Federal Panel should not have construed the 1851 Act as arbitrarily abrogating this duty without regard to the Government's Indian wards.

(2) Their aboriginal title clearly survived the 1848 Cession, see *United States v. Santa Fe Pacific R.R. Co.*, 314

U.S. 339, 345 (1941) ("lands within the Mexican Cession were not excepted from the policy to respect Indian right of occupancy"), and was consequently recognized during the period of 1848 to 1851 under the laws of United States.

(3) The intent of the 1851 Act was to "quiet title." See, *United States v. Title Insurance & Trust Co.*, 44 S.Ct. 621, 622 (1924) (land confirmation proceedings referred to as quiet title action). Since a quiet title action is in effect a conveyance of land, Congress could not have intended the 1851 Act to effectuate an extinguishment of aboriginal Indian title when it is remembered that the Supreme Court unequivocally stated that aboriginal title "is not a right to be transferred but extinguished" and that "[i]t is a right regulated by treaties, not by deed of conveyance." *Fletcher v. Pack*, 10 U.S. (6 Cranch) 87, 121 (1810). The recognized means of extinguishing the title of the Chumash in 1851 was by treaty *with their consent*. See 25 U.S.C. 177, the statute which governed the extinguishment of Indian title in 1877 required the consent of the Indians; this statute expressly provided that "other conveyances of Indian land" such as quiet title actions under the 1851 Act, would not "be of any validity in law or equity."[1]

---

[1]The rule that aboriginal Indian title could be extinguished unilaterally by express act of Congress without compensation [see *Tee-Hit-Ton Indians v. United States*, 75 S.Ct. 313 (1954)] did not come into being until 1903 when the case of *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) held that Congress has plenary power over Indian affairs. Prior to *Lone Wolf*, the means of extinguishing aboriginal Indian title was by treaty or convention under 25 U.S.C. 177. Compare, e.g., the Act of July 27, 1866 (14 Stat. 292), quoted in *United States v. Santa Fe Pacific R.R.*, 314 U.S. at 343, which provided that "The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, *and only with their voluntary cession*" the Indian title to all lands falling under the operation of this act . . ." [Emphasis Supplied].

CONCLUSION

Based on the foregoing argument, the Chumash respectfully request that their petition for rehearing be granted.

RESPECTFULLY SUBMITTED,

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UNITED STATES OF AMERICA, ex. rel., et al. v. Ringrose et al.

Case No.: 85-5508

CERTIFICATE OF SERVICE

I, the undersigned, say:

I am an active member of the State Bar of California and of the United States Court of Appeals, Ninth Circuit, and am not a party to the above-entitled action. My business address is 95 South Market Street, Suite 250, San Jose, California 95113.

I had the foregoing documents served on the below-listed parties to this action by depositing same in the United States mail at San Jose, California, on May 19, 1986, enclosed in a sealed envelope and with first class postage prepaid thereon:

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APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-5508

D.C. No. CV 84-4144-DWW

UNITED STATES OF AMERICA, ex rel. CHUNIE (FRANCES S. HERRERA), THE BROTHERHOOD OF THE TOMOL, INC., a California corporation, and all Chumash descendants similarly situated,

Plaintiffs-Appellants.

vs.

MARIE RINGROSE, ILDA McGUINNESS, PIER GHERINI, FRANCES GHERINI, THE NATURE CONSERVANCY, a District of Columbia non-profit corporation, SANTA CRUZ ISLAND COMPANY, a California corporation, ALEXANDER LENNOX VAIL, JAMES VAIL WILKINSON, NATHAN RUSSEL VAIL, MARGARET VAIL WOOLLEY, and THE VICKERS COMPANY, LTD., a California Corporation; and the STATE OF CALIFORNIA,

Defendants-Appellees.

ORDER

(Filed August 6, 1986)

Before: FLETCHER, PREGERSON and CANBY, Circuit Judges

The petition for rehearing is denied.

APPENDIX G

TREATY OF FEBRUARY 2, 1848 WITH THE REPUBLIC OF MEXICO

In the name of Almighty God:

The United States of America and the United Mexican States, animated by a sincere desire to put an end to the calamities of the war which unhappily exists between the two republics, and to establish upon a solid basis relations of peace and friendship, which shall confer reciprocal benefits upon the citizens of both, and assure the concord, harmony, and mutual confidence wherein the two people should live, as good neighbors, have for that purpose appointed their respective plenipotentiaries—that is to say, the President of the United States has appointed Nicholas P. Trist, a citizen of the United States, and the President of the Mexican republic has appointed Don Luis Gonzaga Cuevas, Don Bernado Couto, and Don Miguel Atristain, citizens of the said republic, who, after a reciprocal communication of their respective full powers, have, under the protection of Almighty God, the author of peace, arranged, agreed upon, and signed the following

Treaty of Peace, Friendship,
Limits; and Settlement between
the United States of America
and the Mexican Republic.

* * * * *

ARTICLE VIII.

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retain-

ing the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.

ARTICLE IX.

Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the meantime

shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

ARTICLE X.

[Stricken out.]

APPENDIX H

CHAP. XII — *An Act to ascertain and settle the private Land Claims in the State of California.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

Sec. 2. *And be it further enacted,* That a secretary, skilled in the Spanish and English languages, shall be appointed by the said commissioners, whose duty it shall be to act as interpreter, and to keep a record of the proceedings of the board in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission.

Sec. 3. *And be it further enacted,* That such clerks, not to exceed five in number, as may be necessary, shall be appointed by the said commissioners.

Sec. 4. *And be it further enacted,* That it shall be lawful for the President of the United States to appoint an agent learned in the law, and skilled in the Spanish and English languages, whose special duty it shall be to superintend the interests of the United States in the premises, to continue him in such agency as long as the public interest may, in the judgment of the President, require his

continuance, and to allow him such compensation as the President shall deem reasonable. It shall be the duty of the said agent to attend the meetings of the board, to collect testimony in behalf of the United States, and to attend on all occasions when the claimant, in any case before the board, shall take depositions; and no deposition taken by or in behalf of any such claimant shall be read in evidence in any case, whether before the commissioners, or before the District or Supreme Court of the United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district, so long before the time of taking the deposition as to enable him to be present at the time and place of taking the same, and like notice shall be given of the time and place of taking any deposition on the part of the United States.

Sec. 5. *And be it further enacted,* That the said commissioners shall hold their sessions at such times and places as the President of the United States shall direct, of which they shall give due and public notice; and the marshal of the district in which the board is sitting shall appoint a deputy, whose duty it shall be to attend upon the said board, and who shall receive the same compensation as is allowed to the marshal for his attendance upon the District Court.

Sec. 6. *And be it further enacted,* That the said commissioners, when sitting as a board, and each commissioner at his chambers, shall be, and are, and is hereby, authorized to administer oaths, and to examine witnesses in any case pending before the commissioners, that all such testimony shall be taken in writing, and shall be recorded

and preserved in bound books to be provided for that purpose.

Sec. 7. *And be it further enacted,* That the secretary of the board shall be, and he is hereby, authorized and required, on the application of the law agent or district attorney of the United States, or of any claimant or his counsel, to issue writs of subpoena commanding the attendance of a witness or witnesses before the said board or any commissioner.

Sec. 8. *And be it further enacted,* That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded to the district attorney of the United States in and for the district in which such decision shall be rendered.

Sec. 9. *And be it further enacted,* That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the United States, to present a petition to the District Court of the district in which the land claimed is situated, praying the

said court to review the decision of the said commissioners, and to decide on the validity of such claim; and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and the party upon whom such service shall be made shall be bound to answer the same within a time to be prescribed by the judge of the District Court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the said case shall stand for trial, unless, on cause shown, the same shall be continued by the court.

Sec. 10. *And be it further enacted,* That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said court shall prescribe; and if the court shall be satisfied that the party desiring to appeal is unable to give such security, the appeal may be allowed without security.

Sec. 11. *And be it further enacted,* That the commissioners herein provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

Sec. 12. *And be it further enacted,* That to entitle either party to a review of the proceedings and decision of the commissioners hereinbefore provided for, notice of the intention of such party to file a petition to the District Court shall be entered on the journal or record of proceedings of the commissioners within sixty days after their decision on the claim has been made and notified to the parties, and such petition shall be filed in the District Court within six months after such decision has been rendered.

Sec. 13. *And be it further enacted,* That all lands, the claims to which have been finally rejected by the commis-

sioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims, the said surveyor-general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office of surveyor of the public lands for the State of Louisiana," approved third March, one thousand eight hundred and thirty-one: *Provided, always*, That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. *And provided, further*, That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been con-

firmed, from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

Sec. 14. *And be it further enacted*, That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town, or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town, or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town, or village on the said seventh July, eighteen hundred and forty-six, being duly proved, shall be prima facie evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town, or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town, or village.

Sec. 15. *And be it further enacted*, That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be

issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

Sec. 16. *And be it further enacted,* That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind,, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

Sec. 17. *And be it further enacted,* That each commissioner appointed under this act shall be allowed and paid at the rate of six thousand dollars per annum; that the secretary of the commissioners shall be allowed and paid at the rate of four thousand dollars per annum; and the clerks herein provided for shall be allowed and paid at the rate of one thousand five hundred dollars per annum; the aforesaid salaries to commence from the day of the notification by the commissioners of the first meeting of the board.

Sec. 18. *And be it further enacted,* That the secretary of the board shall receive no fee except for furnishing certified copies of any paper or record, and for issuing writs of subpoena. For furnishing certified copies of any paper or record, he shall receive twenty cents for every hundred words, and for issuing writs of subpoena, fifty cents for each witness; which fees shall be equally divided between the said secretary and the assistant clerk.

Approved, March 3, 1851.

Supreme Court, U.S.
FILED
NOV 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

86-748

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

UNITED STATES ex rel. CHUNIE, et al.,

Petitioners,

vs.

MARIE RINGROSE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The Act of 1851 implementing the Treaty of Guadalupe Hidalgo was enacted for the overriding purpose of providing repose to land titles in California.

The question presented is:

Whether petitioners' claim to a right of permanent occupancy of islands patented to private respondents' predecessors in Act of 1851 proceedings is barred by the failure of petitioners' predecessors to present a claim in such proceedings.

REQUEST FOR EARLIEST POSSIBLE CONSIDERATION

Respondents respectfully request that, to the extent practicable, the Court consider the petition at the earliest date permitted by its calendar. Certain of the private respondents, who jointly own one of the islands at issue, seek to complete by year-end 1986 a sale of their island to the United States of America for use as a national park. Failure to close this sale by the end of 1986 would cause severe adverse financial consequences for these respondents because of changes in the tax code. Respondents respectfully submit that the petition lacks merit and can be disposed of quickly, permitting this action to be concluded and the sale closed before year end.

LIST OF PARTIES

1. Petitioners Chunie (Frances S. Herrera) and The Brotherhood of the Tomol, Inc., a California corporation.
2. Joint Respondents Marie Ringrose, Ilda McGuinnes, Pier Gherini, Frances Gherini, The Nature Conservancy, Santa Cruz Island Company, Alexander Lennox Vail, James Vail Wilkinson, Nathan Russell Vail, Margaret Vail Woolley, and The Vickers Company, Ltd.
3. Respondent the State of California. Private respondents note the following:
   (a) Although the United States was named as a plaintiff in this suit, petitioners apparently have not obtained the consent of the United States to sue in

its name. Also, although the suit was filed as a class action, no class was certified.

(b) The Nature Conservancy is a District of Columbia non-profit corporation with no parent company, subsidiaries or affiliates.

(c) The Santa Cruz Island Company is a California corporation with no parent company, subsidiaries or affiliates.

(d) The Vickers Company is a California corporation with no parent company, subsidiaries or affiliates.

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No. _____

IN THE
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UNITED STATES ex rel. CHUNIE, et al.,

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vs.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves property rights in Santa Cruz and Santa Rosa Islands, which lie off the California coast near the City of Santa Barbara. As against respondent State of California, petitioners claim the right of permanent occupancy of the sovereign tide and submerged lands and tidelands surrounding the islands. (The State of California is filing a separate opposition to the petition for certiorari.) The remaining respondents (who are jointly filing this opposition) consist of a group of individuals and private entities who hold record fee simple title to the islands (hereafter referred to as the "private respondents"). Petitioners assert that the private respondents' fee simple title to the islands is burdened by a right of permanent occupancy belonging to petitioners. Their claimed right of occupan-

cy, as against both the State of California and the private respondents, is founded on the theory that petitioners hold unextinguished Indian aboriginal title to the islands.

Those private respondents who collectively own Santa Cruz Island trace their title back to an 1839 grant of the island to Andres Castillero by the Republic of Mexico. Those private respondents who own Santa Rosa Island trace their title back to an 1843 grant of the island by the Republic of Mexico to Antonio and Carlos Carrillo.

In 1848, pursuant to the Treaty of Guadalupe Hidalgo which marked the end of the Mexican-American War, Mexico ceded California to the United States. See Treaty of Guadalupe Hidalgo, Feb. 2, 1848, United States-Mexico, 9 Stat. 922 (1848). Shortly thereafter in 1851, Congress passed the Act of March 3, 1851:

"An Act to ascertain and settle the private Land Claims in the State of California," ch. 41, 9 Stat. 631 (1851) (the "Act of 1851").

Pursuant to the Act of 1851, any person claiming land by virtue of any right or title derived from the Spanish or Mexican governments was required to present a claim within two years to the California Board of Land Commissioners, or the claim was forever barred. Id. at §§ 1, 8, 13. If a claim was confirmed at the conclusion of the proceedings, a federal land patent was issued to the claimant. Id. at § 13. All lands which were not the subject of confirmed claims became part of the public domain available for disposal by the United States. Id.

In 1852, both Andres Castillero, to whom Mexico had granted Santa Cruz Island, and the successors-in-interest to

the Carrillos, to whom Mexico had granted Santa Rosa Island, filed petitions to confirm their respective titles under Act of 1851 proceedings. Ultimately, this Court confirmed Castillero's title. United States v. Castillero, 64 U.S. (23 How.) 464, 16 L. Ed. 498 (1860). He received a federal land patent to Santa Cruz Island in 1867. Chunie v. Ringrose, 788 F.2d at 646 (Pet. B-15). Similarly, the Carrillo successors' title to Santa Rosa Island was ultimately confirmed by the United States District Court for the Southern District of California. Manuelo Carrillo de Jones v. United States, (S.D. Cal., Dec. Term 1855) (unpublished). The Carrillo successors received a federal land patent to Santa Rosa Island in 1871. Chunie v. Ringrose, 788 F.2d at 646 (Pet. B-15).

For more than 100 years, title to Santa Cruz and Santa Rosa Islands has

passed peacefully to successive private owners who relied on their predecessors' record titles founded on the federal land patents issued pursuant to the Act of 1851.

Petitioners' predecessors did not present any claim to the islands in Act of 1851 proceedings. Despite this, petitioners brought this action asserting that they have a right of permanent occupancy of the islands and surrounding tide and submerged lands. The district court dismissed the action for failure to state a claim upon which relief could be granted.

On appeal, relying on an unbroken line of this Court's decisions rendered as early as 1855, the Ninth Circuit concluded "that the district court correctly held that the Chumash, claiming a right of occupancy based on aboriginal title, lost all rights in the land when they

failed to present a claim to the commissioners." Chunie v. Ringrose, 788 F.2d at 646 (Pet. B-15). A petition for rehearing to the Ninth Circuit was denied.

REASONS WHY THE PETITION SHOULD BE DENIED

I

THE NINTH CIRCUIT'S DECISION THAT FAILURE TO PRESENT CLAIMS IN ACT OF 1851 PROCEEDINGS IS A CONCLUSIVE BAR TO THE SUBSEQUENT ASSERTION OF SUCH CLAIMS SQUARELY FOLLOWS AN UNBROKEN LINE OF SUPREME COURT AUTHORITY AND DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR ANY OTHER COURT.

In an unbroken line of authority, this Court has held that title confirmed in proceedings under the Act of 1851 is conclusive and not subject to collateral attack.

In 1855, shortly after the Act was passed, this Court noted that the purpose of the Act of 1851 was "to place the titles to land in California upon a stable foundation, and to give parties who

possess them an opportunity of placing them on the records of the country, in a manner and form that will prevent future controversy." Fremont v. United States, 58 U.S. (17 How.) 542, 553, 15 L. Ed. 241 (1855). To effectuate this purpose, this Court held in 1859 that any claim not so presented was lost. United States v. Fossatt, 62 U.S. (24 How.) 445, 16 L. Ed. 185 (1859).

> "This jurisdiction [of the Act of 1851] comprehends every species of title or right, whether inchoate or complete; whether resting in contract or evinced by authentic act and judicial possession."

Fossatt, 62 U.S. (24 How.) at 448.

Two later decisions of the Court -- Barker v. Harvey and United States v. Title Insurance & Trust Co. -- specifically addressed the arguments advanced here by petitioners and rejected them as

improper attempts to relitigate issues of title to lands which were subject to the Act of 1851. Barker v. Harvey, 181 U.S. 481, 21 S. Ct. 690, 45 L. Ed 963 (1901); United States v. Title Insurance & Trust Co., 265 U.S. 472, 44 S. Ct. 621, 68 L. Ed. 1110 (1924). In both of these decisions, this Court held that Indian claims to land acquired by the United States from Mexico were extinguished if they were not presented in proceedings conducted under the Act of 1851.

Barker was an action to quiet title resting on a federal patent issued after Mexican grants were confirmed in proceedings under the Act of 1851. The Indian defendants challenged plaintiff's federal patent on the grounds that a provision in one of the grants provided that the grantee could "not molest (prejudicar) the Indians that thereon may be established," and that the Indians had

occupied the land in issue before the Mexican grants. 181 U.S. at 493.

This Court, in considering the contentions of the Indians, determined:

> "If these Indians had any claims founded on the action of the Mexican government they abandoned them by not presenting them to the commission for consideration. . . . If it be said that the Indians do not claim the fee, but only the right of occupation, and therefore, they do not come within the provision of § 8 [of the Act] as persons 'claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government,' it may be replied that a claim of right to permanent occupancy of land is one of far reaching effect, and it could not well be said that the lands which were bur-

dened with the right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States."

181 U.S. at 491-92.

Thus, regardless of the nature of the claim asserted, this Court held in Barker that the Act of 1851

"not only permitted but required all claims to be presented to the board, and barred all from future assertion which were not presented within two years after the date of the act."

181 U.S. at 490.

This Court's 1901 Barker holding rejecting the claims of Indians for failure to present them as required by the Act of 1851 was reaffirmed twenty-three years later in United States v. Title Insurance & Trust Co., supra. The Indians there claimed that under the laws of Mexico they had been entitled to contin-

uous and undisturbed occupancy of land which had been patented to defendants' predecessor in proceedings under the Act of 1851. 265 U.S. at 482.

Asserting that the Indian right of permanent occupancy was consistent with the defendants' title, the United States (on behalf of the Indians) argued:

> "The Indian title is both legal and equitable in its nature and has been variously likened to an easement, life estate, trust or use with which the fee is charged. . . . Further, when the fee passes from the Government into private hands under a general conveyance, it is, for a time being, only a naked fee."

265 U.S. at 474. In addition, the United States (on behalf of the Indians) attempted to distinguish Barker by claiming that "the Indian claim [in Barker] was presented as though founded on a pro-

tective clause in an earlier grant . . . and its true basis, viz: the tribal possessory title, was apparently not emphasized," 265 U.S. at 477, whereas the Indians in Title Insurance purportedly "became entitled to the 'continuous and undisturbed' occupancy and use of a part of the lands in the [Mexican] grant before it was made." 265 U.S. at 482.

This Court rejected the argument and declined the United States' invitation either to distinguish or overrule Barker, finding instead that the Barker "case and this [Title Insurance] are so much alike that what was said and ruled in that should be equally applicable in this." 265 U.S. at 485-86.

Six months after its decision in Title Insurance, this Court held that the Barker-Title Insurance doctrine required Indians to present their claims, without regard to whether the Indians were

Mission Indians who settled on or near the Spanish Missions, or other Indians. Super v. Work, 3 F.2d 90 (D.C. Cir. 1925), aff'd per curiam. 271 U.S. 643 (1926).

In 1941, this Court again emphasized that Indian claims based on aboriginal title were barred if they were not submitted under the Act of 1851. United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 350, 62 S. Ct. 248, 86 L. Ed. 260 (1941) ("the Act of 1851 was interpreted as containing machinery for extinguishment of claims, including those based on Indian right of occupancy"). And, fourteen years later, the Court reiterated the principle that the United States as the sovereign is free to extinguish aboriginal title without any obligation to pay compensation. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 285, 75

S. Ct. 313, 99 L. Ed. 314 (1955). Finally, this Court's recent decision in Summa Corp. v. California ex rel. State Lands Commission, 466 U.S. 198, 104 S. Ct. 1751, 80 L. Ed. 2d 237 (1984), recognizes the continuing validity of Barker and Title Insurance by reaffirming the principle that claims to California land originally under Mexican jurisdiction are barred if not presented in Act of 1851 land confirmation proceedings.

In Summa, the State of California asserted that it held a "public trust easement" over a privately-owned lagoon because the area was a tideland at the time that California became a state. After a thorough review of the Treaty of Guadalupe Hidalgo and the land confirmation proceedings established by the Act of 1851, the Court held that California could no longer assert an interest in the property. Reaffirming the importance of

providing repose to land titles, the Court held in Summa:

> "The interest claimed by California is one of such substantial magnitude that regardless of the fact that the claim is asserted by the State in its sovereign capacity, this interest, like the Indian claims made in Barker and United States v. Title Insurance Co., must have been presented in the patent proceeding or be barred."

466 U.S. at 209.

Petitioners contend that this Court's decision in Cramer v. United States, 261 U.S. 219, 43 S. Ct. 342, 67 L. Ed. 622 (1923), a decision rendered fourteen months before this Court's decision in Title Insurance, is controlling here. According to petitioners, the Ninth Circuit's failure to follow Cramer renders the Ninth Circuit's decision in

conflict with a decision of the Court. However, because Cramer involves an entirely different question, the Ninth Circuit properly declined to apply it.

In Cramer, a patent had been issued in 1904 to confirm a grant made by the federal government in 1866 to defendant's predecessor. This 1866 grant excepted lands found to be "granted, sold, reserved, occupied by homestead settlers, pre-empted [sic] or otherwise disposed of." 261 U.S. at 225. Several Indian families had resided on the patented land continuously since as early as 1859. 261 U.S. at 226. This Court held that the portion of the land occupied by the Indians was within the clause of the 1866 grant excepting lands "reserved . . . or otherwise disposed of," and that the Indians thus had the right to continue their occupancy.

Cramer did not involve either a patent issued pursuant to Act of 1851 proceedings or an Indian claim of aboriginal title arising from occupancy prior to Mexico's cession of California to the United States. Thus, the Ninth Circuit here correctly distinguished Cramer, stating:

> "The Cramer court observed that the Indians in the case before it did not derive their claims from the Spanish or Mexican governments, and that there was no showing that they had occupied the land as early as 1848, when the Treaty was signed, or 1851, when the land confirmation act was enacted. Id. These facts explain the court's remark that the Cramer Indians 'are not shown to be within the terms of the Act of 1851 in any respect.'"

Chunie v. Ringrose, 788 F.2d at 646 (Pet. D-2).

In sum, the Ninth Circuit's opinion squarely follows this Court's decisions holding that claims not presented in Act of 1851 proceedings are barred.

II

THE NINTH CIRCUIT'S RULING THAT INDIAN ABORIGINAL TITLE IS A CREATURE OF THE CONQUERING SOVEREIGN'S LAW CORRECTLY STATES THE RULE SET FORTH IN THIS COURT'S 1823 DECISION IN JOHNSON v. M'INTOSH AND DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR ANY OTHER COURT.

Petitioners argue that the Ninth Circuit's opinion is in conflict with this Court's opinions in Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 3 L. Ed. 162 (1810), and Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823) (Pet. 17-18), because the Ninth Circuit stated that aboriginal title is "necessarily a creature of the conquering sovereign's law." Chunie v. Ringrose, 788 F.2d at 642 (Pet. B-4 to B-5). Apparently, peti-

tioners assert that aboriginal title exists in the "abstract" and is not "derived from" the laws of any nation and, therefore, that petitioners' predecessors did not come within the language of the Act of 1851 requiring "every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" to present his or her claim to the Commissioners within two years. Act of 1851 §§ 1, 8, 13. Petitioners' authorities simply do not support their novel concept of aboriginal title.

First, the language quoted in the petition as the purported "ruling" of this Court in Fletcher v. Peck is merely a recitation of the argument of counsel and is not the opinion of this Court. Second, Johnson v. M'Intosh does not at all support petitioners' assertions regarding the source of aboriginal title.

Instead, Johnson v. M'Intosh recognized that aboriginal title is derived from the law of the conquering sovereign. As this Court explained in Tee-Hit-Ton Indians v. United States:

> "[Aboriginal title] is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."

348 U.S. 272, 279, 75 S. Ct. 313, 99 L. Ed. 314 (1955) (emphasis added).

Aboriginal title, like every other title, was held in Barker to be subject to the Act of 1851. This Court reasoned in part:

"Undoubtedly by the rules of international law, and in accordance with the provisions of the treaty between the Mexican government and this country, the United States were bound to respect the rights of private property in the ceded territory. But such obligation is entirely consistent with the right of this government to provide reasonable means for determining the validity of all titles within the ceded territory, to require all persons having claims to lands to present them for recognition, and to decree that all claims which are not thus presented shall be considered abandoned."

181 U.S. at 486-87.

Barker explicity rejected the argument that Indian aboriginal claims were not derived from the Spanish or Mexican

governments. 181 U.S. 492. Instead, Barker and subsequent decisions of this Court have held that Indian aboriginal title claims, like all other claims, were required to be submitted in Act of 1851 proceedings or forever be barred.

Thus, there is no conflict between the Ninth Circuit's decision and this Court's decisions concerning aboriginal title claims and the Act of 1851.

III

THE NINTH CIRCUIT'S DECISION DOES NOT HOLD THAT INDIAN ABORIGINAL TITLE WAS "FROZEN" IN 1848 AND DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR ANY OTHER COURT.

Petitioners purport to establish a "conflict" between the Ninth Circuit's opinion and the decisions of this Court and the Court of Claims by asserting that

> "[t]he Appeal Panel's ruling that Chumash aboriginal title was frozen in 1848 when the United States acquired California from

Mexico under the Treaty of Guadalupe Hidalgo and extended its sovereignty to the area is clearly erroneous." (Pet. 19.) The opinion of the Ninth Circuit, however, does not make such a ruling, and consequently it does not conflict with this Court's decision in United States ex rel. Hualpai Indians v. Santa Fe Pacific Railway Co., 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941), or the Court of Claims decision in Sac and Fox Tribe of Indians of Oklahoma v. United States, 383 F.2d 991 (Ct. Cl.), cert denied, 389 U.S. 900 (1967).

Contrary to petitioners' assertion, the Ninth Circuit did not fix a cut-off date for the establishment of Indian title; the court held only that the last date on which the Chumash lost any claim of aboriginal title derived from a right of occupancy existing under Spanish or Mexican law was two years following the

enactment of the Act of 1851. Thus, no conflict exists between the Ninth Circuit's decision and this Court's decision in Santa Fe or the Court of Claims' decision in Sac and Fox Tribe.

IV

LONG ESTABLISHED SUPREME COURT AUTHORITY HAS RESOLVED IMPORTANT QUESTIONS AFFECTING TITLES TO LAND IN CALIFORNIA AND HAVING BEEN RESOLVED, SUCH QUESTIONS SHOULD NO LONGER BE CONSIDERED OPEN.

For over 100 years, the titles to Santa Cruz and Santa Rosa Islands have passed to successive private owners who relied on the record title of their predecessors as established in Act of 1851 proceedings. Titles to both of the islands were the subject of explicit judicial scrutiny: the Supreme Court's decision in United States v. Castillero, supra, and the district court's decision in Carrillo de Jones v. United States, supra.

A long line of judicial authority has directly addressed the scope of the Act of 1851 and has held that all claims not presented in Act of 1851 proceedings are forever barred. These decisions have, in the words of this Court, become rules of property.

> "'Where questions arise which affect titles to land, it is of great importance to the public that, when they are once decided, they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate, and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retro-

spective, and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.'"

Title Insurance, 265 U.S. at 486-87 (quoting Minnesota Co. v. National Co., 70 U.S. (3 Wall.) 332, 18 L. Ed. 42 (1866)). See also Summa Corp. v. California ex rel. State Lands Commission, 466 U.S. 198, 104 S. Ct. 1751, 80 L. Ed. 2d 237 (1984) (adverse effects on land titles counsel adherence to a settled interpretation).

Over sixty years have passed since this Court's decision in Title Insurance, making even more critical the need for continued adherence to the more than one hundred years of consistent judicial interpretation of the Act of 1851. Title

to much of the land in California is founded on federal patents issued pursuant to the Act of 1851. Questions concerning the effect of failure to submit claims under the Act of 1851 have long been resolved by this Court and should no longer be considered open.

CONCLUSION

For the foregoing reasons, the private respondents respectfully request that the petition be denied.

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No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

UNITED STATES ex rel. CHUNIE, et al.,

Petitioners,

vs.

MARIE RINGROSE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT STATE OF CALIFORNIA'S MEMORANDUM IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The Act of 1851 implementing the Treaty of Guadalupe Hidalgo was enacted for the overriding purpose of providing repose to land titles in California.

The question presented is:

Whether petitioners' claim to a right of permanent occupancy of the State of California's sovereign tide and submerged lands surrounding certain islands was extinguished by the failure of petitioners' predecessors to present a claim pursuant to the Act of 1851.

MEMORANDUM OPPOSING CERTIORARI

Petitioners claim to hold unextinguished aboriginal title to the State of California's sovereign tide and submerged lands surrounding Santa Cruz and Santa Rosa Islands. The Ninth Circuit held that petitioners lost any interest they may have had in those areas because of the unquestioned failure of their predecessors to submit a claim pursuant to the Act of March 3, 1851, 9 Stat. 631, ch. 41. This holding is based on a long and unbroken line of Supreme Court decisions. Barker v. Harvey, 181 U.S. 481, 491-92 (1901); United States v. Coronado Beach Co., 255 U.S. 472, 488 (1921); United States v. Title Insur. & Trust Co., 265 U.S. 472, 482 (1925); Super v. Work, 3 F.2d 90, 91 (D.C. Cir. 1925), aff'd, 271 U.S. 643 (1926); United States ex rel. Hualpai Indians v. Santa Fe Pacific R.R., 314 U.S.

339, 350 (1941); Summa Corp. v. California ex rel. State Lands Commission, 466 U.S. 198, 208-09, 104 S. Ct. 1751 (1984).

Cramer v. United States, 261 U.S. 219 (1923), cited by petitioners, is completely distinguishable and is not inconsistent with these cases. In Cramer, it was specifically noted that the Act of 1851 had no application to the Indian occupancy claim in that case for, among other reasons, the occupancy had not commenced when the Act of 1851 was passed. Id. at 231. In this case, petitioners have claimed that the aboriginal occupancy claim existed at the time the Act of 1851 was passed.

Since the cases relied upon by the Ninth Circuit are controlling, respondent State of California joins with the other respondents, private parties who hold record fee title to Santa Cruz and Santa Rosa Islands, in submitting that there is

no reason for the Court to grant certiorari in this case.

Therefore, the petition for a writ of certiorari should be denied.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

INTRODUCTION

This Reply Brief[1] is filed pursuant to Rule 22.5 of the Rules of the United States Supreme Court and ad-

[1]Private Respondents state that "[a]lthough the United States was named as a plaintiff in this suit, petitioners apparently have not obtained the consent of the United States to sue in its name." Joint Brief at iii-iv.

The Chumash filed this suit as a *qui tam* action under the authority of 25 U.S.C. 201 to collect penalties under 25 U.S.C. 179 and 180. Section 201 provides that "[a]ll penalties which shall accrue under this title shall be sued for and recovered in

(Continued on following page)

dresses issues presented in the Briefs in Opposition to the Petition for a Writ of Certiorari filed by the State of California and Private Respondents.

ARGUMENT

I. PRIVATE RESPONDENTS' ARGUMENTS THAT SUPREME COURT CASES SUPPORT THEIR POSITION THAT THE 1851 ACT EXTINGUISHED ABORIGINAL INDIAN TITLE IS CORRECT AS TO SOVEREIGN OR FEE TITLE, BUT INCORRECT AS TO ABORIGINAL INDIAN TITLE.

In Argument I of the Joint Brief, Private Respondents argue that an unbroken line of case authority has held that title confirmed in proceedings under the Act of 1851 (9 Stat. 631) is conclusive and not subject to collateral attack. Joint Brief at 7-19. The State of California makes similar arguments in its Brief. State Brief at 1-3. Both Private Respondents and the State, however, fail to understand that the 1851 Act was concerned with perfecting *fee title* only, since only fee title can be "derived" from the Spanish and Mexican Governments.

Fremont v. United States, 58 U.S. (17 How.) 542 (1855) and *United States v. Fossatt*, 62 U.S. (24 How.) 445 (1859) do not concern Indians or aboriginal Indian title claims. *Barker v. Harvey*, 181 U.S. 481 (1901), *United States v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924),

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(Continued from previous page)

an action in the nature of debt, *in the name of the United States*, before any court having jurisdiction over the same, in any State or Territory in which the defendant shall be arrested or found, the one half to the use of the informer and the other half to the United States . . ." [Emphasis Supplied]. Thus, the authority for the Chumash to sue in the name of the United States is contained in 25 U.S.C. 201.

and *Super v. Work*, 3 F.2d 90 (D.C. Cir. 1925), aff'd. per curiam 271 U.S. 643 (1926), also do not support Respondents' positions, since they concern Indian interests derived from the Mexican Government and not aboriginal Indian title.

The Appeal Panel correctly noted that the defendants in *Barker* "[a]s Mission Indians . . . apparently claimed a right of occupancy derived from the Mexican Government" and correctly concluded that this fact "would support the Court's holding on the basis that the Indians' rights were 'derived from the Mexican government' and thus subject to the filing requirement of the Act of 1851." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 645 (9th Cir. 1986), Appendix at B-12 to B-13.

The Appeal Panel found that in *Title Insurance*, the Indians claimed a "perpetual right" to occupy land for which the Mexican government had granted and for which a confirmed patent had been issued and that the Indians' claims were lost by failing to present them to the 1851 commission. The Appeal Panel noted that the Indians claimed an "aboriginal right of occupancy." *Ringrose, supra*, 788 F.2d at 645. The "perpetual right" of occupancy in *Title Insurance*, however, arose "under the laws of Mexico" on a theory of adverse possession. *Title Insurance, supra*, 265 U.S. at 482. Thus, *Title Insurance*, like *Barker*, involved a claim derived from the Mexican Governments: "Enough has been said to make it apparent that [the *Barker*] case and this are so much alike that what was said and ruled on in that should be equally applicable in this." 265 U.S. at 485-486. Accord, *Summa*

Corp. v. California ex rel. State Land Commission, 466 U.S. 198, 209 (1984).

The Appeal Panel further found that the same principle applied to the Indians in *Super v. Work*, 3 F.2d 90 (D.C. Cir. 1925). See *Ringrose, supra*, 788 F.2d at 645, Appendix at B-13. Citing *Barker v. Harvey*, the appeals court in *Work* noted that the rights of the Indians differed from the Indians in *Barker* and *Title Insurance* "only to the extent that in those cases they were Mission Indians, while, in the present case, at and prior to the cession by Mexico, the plaintiff Indians were merely roving bands," and found that the Indians abandoned their claims by failing to present them to the 1851 Commission. *Work, supra*, 3 F.2d at 91. The Supreme Court summarily affirmed on this basis. See 271 U.S. at 643. Thus, the claims of the Indians in *Work*, like the claims of the Indians in *Barker* and *Title Insurance* were derived from the Mexican Government and hence must have been presented in the land confirmation proceedings undertaken pursuant to the 1851 Act.

Private Respondents citation of *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941), for the proposition that the 1851 Act applied to claims in California based on aboriginal Indian title is misplaced. What the Court found in *Santa Fe* was that Indian claims to occupancy, like those in *Barker* and *Title Insurance*, were subject to the 1851 Act. *Santa Fe, supra*, 314 U.S. at 350.

The Indians in *Cramer v. United States*, 261 U.S. 219 (1922),—unlike the Indians in *Barker, supra, Title Insurance, supra* and *Work, supra*—made a claim based on aboriginal Indian title and not upon title or interests de-

rived from the Mexican government. The Court stated that:

> Unquestionably, it has been the policy of the Federal government from the beginning to respect the Indian right of occupancy, which could only be interferred with or determined by the United States. * * * It is true that this policy has had in view the original nomadic tribal occupancy, but it is likewise true that, in its essential spirit, it applies to individual Indian occupancy as well . . . *Id.* at 227.
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> * * *
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> It is insisted that any rights these Indians might otherwise have had are barred by the provisions of the Act of March 3, 1851, 9 Stat. at L 631, Chap. 41. This statute required every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican governments to present the same for settlement to a commission created by the Act. There was a provision directing the commission to ascertain and report the tenure by which the mission lands were held and those held by civilized Indians, and other Indians described. *The act plainly has no application. The Indians here concerned do not belong to any of the classes described therein, and their claims were in no way derived from the Spanish or Mexican governments. Id.,* 261 U.S. at 230-231. (Emphasis Supplied.)

Private Respondents attempt to distinguish *Cramer* on the basis that it involved individual tribal occupancy rather than nomadic tribal occupancy. Their position, however, overlooks the Court's ruling in *Santa Fe, supra,* 314 U.S. at 346, that individual aboriginal Indian title is "not

to be treated differently from 'the original nomadic tribal occupancy.' "[2]

II. ABORIGINAL INDIAN TITLE IS NOT A CREATURE OF A CONQUERING SOVEREIGN'S LAW, BUT IS RATHER A PRINCIPLE OF INTERNATIONAL LAW BASED ON THE DOCTRINE OF DISCOVERY.

In Argument II of the Joint Brief, Private Respondents argue that aboriginal Indian title does not depend upon international law, but is rather a creature of a conquering sovereign's law and neither *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) or *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823), support petitioners' assertions regarding the source of aboriginal title. Joint Brief at 19-23. They argue that "*Johnson v. M'Intosh* recognized that aboriginal title is derived from the law of the conquering sovereign," and "aboriginal title, like every other title, was held in *Barker* to be subject to the act of 1851."[3] Joint Brief at 21.

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[2]Although California has no disclaimer in its Enabling Act (9 Stat. 452), the Court in *Cramer*, stated that "Congress itself, in apparent recognition of possible Indian possession, has in several state enabling acts, required the incoming states to disclaim all right and title to the lands owned or held by any Indian or Indian tribe" and found the policy of protecting "any Indian" as applicable to California. *Id.*, 261 U.S. at 228. If the policy of protecting "any Indian" is applicable to California, then it follows that the policy of protecting the aboriginal Indian title lands of "any . . . Indian tribe" should also be applicable.

[3]As previously noted, *Barker v. Harvey* did not involve an aboriginal Indian title claim. Private Respondents' statement that the *Barker* case held that aboriginal Indian title is subject to the 1851 Act is therefore misplaced.

In support of their argument that aboriginal Indian title does not depend upon international law, Private Respondents state "the language quoted in the petition as the purported 'ruling' of this Court in *Fletcher v. Peck*[4] is merely a recitation of the argument of counsel and is not the opinion of this Court." Joint Brief at 20. This statement is erroneous, however, since the language quoted in the Petition is actually the language of the Court on its interpretation of aboriginal Indian title. Moreover, *Johnson v. M'Intosh*, expressly states that the doctrine of discovery—upon which aboriginal Indian title is derived—was necessarily established as a principle by which the nations of Europe "should acknowledge as the law by which the right of acquisition [of Indian land] . . . should be regulated as between themselves." *Id.* at 572.

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[4]This language reads as follows:

> What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; for they have no idea of a title to the soil itself. It's overrun by them, rather than inhabited. It is not a true and legal possession. *Vattel*, b. 1. § 81. p. 37 and c. 209. b. 2. § 97. *Montesquieu*, b. 18. c. 12. *Smith's Wealth of Nations*, b. 5. c. 1. It is a right regulated by treaties, not by deeds of conveyance. *It depends upon the law of nations*, not upon municipal rights. (Emphasis Supplied)

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 121 (1810)

III. THE NINTH CIRCUIT'S DECISION DID FREEZE INDIAN ABORIGINAL TITLE IN 1848 AND CONFLICTS WITH PRIOR DECISIONS OF THE SUPREME COURT AND COURTS OF CLAIMS.

In Argument II of the Joint Brief, Private Respondents argue that the Appeal Panel's ruling does not freeze aboriginal Indian title in California as of 1848:

> Contrary to petitioner's assertion, the Ninth Circuit did not fix a cut-off date for the establishment of Indian title; the court held only that the last date on which the Chumash lost any claim of aboriginal title derived from a right of occupancy existing under Spanish or Mexican law was two years following the enactment of the Act of 1851. Thus, no conflict exists between the Ninth Circuit's decision and this Court's decision in *Santa Fe* or the Court of Claims' decision in *Sac and Fox Tribe*.

Joint Brief at 24-25.

This assertion is a logical non-sequitur. How can a claim of aboriginal Indian title "derived" from the laws of Mexico exist up to 1853 in California, if the area was ceded by Mexico in 1848? The only way the Appeal Panel could reach its decision that Chumash aboriginal title was "derived" from the laws of Mexico and hence subject to the 1851 Act was to freeze their aboriginal title as of 1848. The Appeal Panel simply refused to recognize Chumash aboriginal title under American law subsequent to 1848. This is directly contrary to the Court's decision in *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railway Co.*, 314 U.S. 339, 345-346 (1941), that aboriginal Indian title survived the 1848 cession of territory

from Mexico to the United States and the Court of Claim's decision in *Sac and Fox Tribe v. United States*, 383 F.2d 991, 998-999 (Ct.Cl. 1967) that aboriginal Indian title is not frozen upon state succession.

IV. PRIVATE RESPONDENTS' CLAIM THAT ESTABLISHED SUPREME COURT AUTHORITY HAS RESOLVED IMPORTANT QUESTIONS AFFECTING LAND TITLES IN CALIFORNIA AND SHOULD NO LONGER BE OPEN IS CORRECT AS TO FEE TITLE, BUT NOT ABORIGINAL INDIAN TITLE.

In Argument IV of the Joint Brief, Private Respondents argue that, for over 100 years, titles to Santa Cruz and Santa Rosa Islands have passed to successive private owners who relied on the record title of their predecessors as initially established under the Act of 1851, and that these titles were confirmed by court decisions and should no longer be open to question. Joint Brief at 25-26. These arguments are valid as to fee title, but are inaccurate as to aboriginal Indian title.

Private Respondents ignore the rule that aboriginal Indian title recognizes the Indians as "the rightful occupants of the soil, with a legal as well as just claim to retain possession," *Johnson v. M'Intosh*, *supra*, 21 U.S. (8 Wheat) at 574, which right of possession "is good against all but the sovereign" and can "be terminated only by sovereign act." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974). They also ignore the rule grants in fee "have been understood by all, to convey a title to the grantees, subject only to the Indian right of

occupancy." *Johnson v. M'Intosh, supra,* 21 U.S. (8 Wheat) at 574. Indeed, recent eastern land claims based on aboriginal title are many years older than the Chumash claim. See, e.g., *Oneida County, N.Y. v. Oneida Indian Nation,* 105 S.Ct. 1245 (1986); *Oneida Indian Nation v. County of Oneida, supra; Joint Tribal Council of Passamadquaoddy Tribe v. Morton,* 388 F.Supp. 649 (D.Me. 1974), affd. 528 F.2d 370 (1st Cir. 1975).

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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